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Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

ARCTIC SLOPE REGIONAL CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY
COMMISSION, ET AL., RESPONDENTS

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PAUL M. BATOR

MARK I. LEVY *

Mayer, Brown & Platt
190 South La Salle Street
Chicago, Illinois 60603
(312) 782-0600

O. YALE LEWIS, JR.

RICHARD A. CURTIN

Hendricks & Lewis
2675 First Interstate Center
Seattle, Washington 98104
(206) 624-1933

WILLIAM W. BECKER

Landfield, Becker & Green
1818 N Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 775-0300

Counsel for Petitioner

* Counsel of Record

QUESTIONS PRESENTED

1. Whether FERC's dismissal from a ratemaking proceeding of a party that is currently and directly harmed by the challenged rates, in order to approve a settlement reached by other parties and thus terminate the proceeding without a decision on the lawfulness of the rates, is a violation of the Due Process Clause, the Interstate Commerce Act, and FERC regulations.

2. Whether the court of appeals, in affirming FERC's dismissal of petitioner from the Trans Alaska Pipeline System ratemaking proceeding, erred by adopting a rationale that the agency itself had not considered or adopted.

**PARTIES TO THE PROCEEDING
AND RULE 28.1 STATEMENT**

In addition to the parties listed in the caption, the United States was a respondent in the court of appeals. Intervenor-respondents in the court below were the State of Alaska and the eight owners of the Trans Alaska Pipeline System: Amerada Hess Pipeline Corporation, Arco Pipe Line Company, BP Pipelines Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, Sohio Pipe Line Company, and Unocal Pipeline Company.

Pursuant to Rule 28.1 of the Rules of this Court, petitioner Arctic Slope Regional Corporation states that it has no parent companies and that its subsidiaries or affiliates (other than those that are wholly-owned or owned by Alaska Natives) are Alliance Bancorporation, American Indian National Bank ("Metropolitan Bank"), Anglo Alaska Drilling Associates, Executone of Alaska, MetroComm Inc., Natchiq, Inc., PCA of Alaska, and Petro Star Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Arctic Slope Regional Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 832 F.2d 158. The order of the Federal Energy Regulatory Commission approving the final settlement and dismissing Arctic's complaint (App., *infra*, 22a-44a) and its previous order approving the initial settlement (*id.* at 54a-64a) are reported respectively at 35 F.E.R.C. (CCH) ¶ 61,425 and 33 F.E.R.C. (CCH) ¶ 61,064. Other orders of the Commission and of the ad-

ministrative law judges (App., *infra*, 45a-49a, 50a-53a, 65a-70a) are reported at 35 F.E.R.C. (CCH) ¶ 63,018; 33 *id.* ¶ 61,392; and 32 *id.* ¶ 63,058.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 76a-78a) was entered on October 27, 1987. A timely petition for rehearing was denied on January 15, 1988 (*id.* at 79a-80a). On April 4, 1988, the Chief Justice granted an extension of time to and including May 14, 1988, within which to file a petition for a writ of certiorari (*id.* at 90a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Interstate Commerce Act and of FERC's regulations are set forth at App., *infra*, 81a-89a.

STATEMENT

This case raises important issues of pipeline rate regulation and administrative law in the context of a major ratemaking proceeding involving the Trans Alaska Pipeline System ("TAPS"). Petitioner's vital economic interests are currently and directly harmed by high TAPS rates, and it has pursued its challenge to the legality of those rates through nine years of administrative proceedings. Nevertheless, the court of appeals has allowed FERC to dismiss petitioner's complaint, without determining the lawfulness of the rates, in order to approve a settlement reached by other parties. This fundamentally unfair procedure violates the Due Process Clause, the Interstate Commerce Act, and FERC regulations. Moreover, the ruling below sanctions current and future TAPS rates that are alleged to be unlawful, thereby jeopardizing both the interests of oil owners and consumers protected under the Interstate Commerce Act

and the interests of Alaskan Natives conferred by Congress in the Alaska Native Claims Settlement Act.

1. The background of this case is already familiar to the Court. See *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978) ("*TAPS I*"). In 1968, large reserves of oil were discovered at Prudhoe Bay in the Alaska Arctic. The eight intervenor-respondents constructed TAPS to transport that oil to the all-weather port of Valdez. TAPS is the only feasible means for transporting oil out of the Alaska Arctic. See *TAPS I*, 436 U.S. at 634 & n.3; App., *infra*, 2a & n.1.

TAPS was completed in 1977 at a cost of more than \$9 billion—some \$8 billion more than its projected cost. The TAPS owners filed proposed TAPS rates with the Interstate Commerce Commission.¹ These rates were immediately protested by the State of Alaska, the United States Department of Justice, the ICC's Bureau of Investigation and Enforcement, and petitioner Arctic Slope Regional Corporation ("Arctic"), on the ground that the charges were not "just and reasonable" under Section 1(5) of the Interstate Commerce Act, 49 U.S.C. § 1(5).² See *TAPS I*, 436 U.S. at 634-635; App., *infra*, 3a.

2. Arctic is a private for-profit corporation established under Alaska law pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601 *et seq.* In order to promote the development of the oil reserves

¹ Prior to October 1, 1977, the ICC had jurisdiction over oil pipelines. Effective on that date, jurisdiction was transferred to the Federal Energy Regulatory Commission. See *TAPS I*, 436 U.S. at 634 n.4.

² The Interstate Commerce Act was recodified in October 1978. See 49 U.S.C. §§ 10101 *et seq.* However, oil pipelines continue to be regulated under the original Act. See *Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1493 n.18 (D.C. Cir.), cert. denied, 469 U.S. 1034 (1984). In this petition, we shall refer to the original version of the statute prior to the recodification.

discovered in Alaska, ANCSA extinguished the Natives' aboriginal land claims and compensated them with cash and land. Arctic, one of 13 regional corporations, administers that award for the benefit of its Inupiat Eskimo shareholders. See *TAPS I*, 436 U.S. at 635 & n.7; App., *infra*, 3a.

Arctic is the largest private owner of land on the Alaska North Slope, holding title to approximately 4.5 million acres. This land contains proven, probable, and possible oil reserves and is Arctic's single most important economic asset. Arctic's holdings include substantial interests in the Arctic National Wildlife Refuge, an area that is "potentially rich in oil and gas resources" and "one of the most outstanding prospective oil and gas areas remaining in the United States." See U.S. Fish and Wildlife Service, Dep't of the Interior, Arctic National Wildlife Refuge, Alaska, Coastal Plain Resource Assessment 43, 56, 57, 143 (Apr. 1987).

Arctic derives revenue by leasing its lands to oil companies for exploration and development. Arctic receives significant current income from bonuses paid for entering into leases and rentals paid during the terms of the leases; the bonuses and rentals reflect the anticipated profitability of the oil projects and are paid whether or not oil is actually produced. In addition, leases fix royalty rates and working interests based on the expected profitability of the fields and thus determine the amount per barrel that Arctic will receive in production payments.

The value of the oil on Arctic's lands is reduced dollar-for-dollar by the TAPS charges for transporting the oil to market (see *TAPS I*, 436 U.S. at 635 n.6), and hence the value of Arctic's leasing rights is inversely related to the TAPS tariffs. Moreover, excessive TAPS costs can preclude or delay both the leasing and the development of marginal oil fields by making such oil uneconomical in the market. See C.A. App. 174, 208. Thus, Arctic's current economic interest is directly and adversely affected by

unjust and unreasonable TAPS rates. See, *e.g.*, *id.* at 173-174, 197, 206-208.

Arctic has been actively engaged in leasing its lands for exploration and development. By 1985, it had entered into leases that provide both substantial bonuses and royalties ranging from 12.5-20% for 2.1 million acres of its land. Arctic continues to negotiate leases on an ongoing basis. See C.A. App. 158-170. It is expected that oil from Arctic's lands will begin to be shipped through TAPS sometime in the 1990s.

3. Based on the protests of Arctic and the other complainants, the ICC suspended the proposed TAPS rates for the maximum period of seven months pursuant to 49 U.S.C. § 15(7). The Commission found that there was "reason to believe the proposed rates are not just and reasonable" and that "protestants have made a showing of probable unlawfulness." *Trans Alaska Pipeline System*, 355 I.C.C. 80, 81, 82 (1977); see *TAPS I*, 436 U.S. at 636. The Commission commenced a formal investigation of the lawfulness of the TAPS rates and prescribed interim rates to be effective during the suspension period; the weighted average of those rates was 22% below that of the rates filed by the TAPS owners. This Court upheld the Commission's action in *TAPS I*.

Following transfer of jurisdiction over oil pipelines (see note 1, *supra*), the Federal Energy Regulatory Commission conducted administrative proceedings to determine just and reasonable TAPS rates. These proceedings were divided into two parts. Phase I addressed issues concerning the ratemaking methodology, including the proper rate base and rate of return. Phase II considered the prudence and reasonableness of the \$9.6 billion TAPS construction cost and various cost-of-service issues.

On February 1, 1980, after a lengthy administrative proceeding, the FERC administrative law judge ren-

dered an initial decision on Phase I that established a comprehensive ratesetting methodology for the economic life of TAPS. See 10 F.E.R.C. (CCH) ¶ 63,026. Rates under this methodology (even without an adjustment for Phase II issues) were 9-20% below the tariffs filed by the TAPS owners for the initial years and declined sharply thereafter.

On appeal of the initial decision, Arctic, the State of Alaska, the Department of Justice, and the FERC staff urged the Commission to uphold the principal elements of the ALJ's ratesetting methodology. While the appeal was pending, the Commission decided *Williams Pipe Line Co.*, 21 F.E.R.C. (CCH) ¶ 61,260 (1982), which essentially deregulated oil pipeline rates in the lower 48 states. In light of *Williams Pipe Line*, FERC remanded the Phase I decision in this case for further proceedings before the ALJ. Before the remand proceedings had been completed, however, FERC's *Williams Pipe Line* decision was reversed in *Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir.), cert. denied, 469 U.S. 1034 (1984). The Phase I remand proceedings were then suspended, but FERC never issued a final ruling on the appeal of the Phase I initial decision.

In the meantime, the Phase II proceedings were underway. The extensive Phase II record was closed in December 1984. The parties submitted initial briefs and proposed findings in September 1985, and were preparing reply briefs when Phase II proceedings were suspended on October 24, 1985, because of a proposed settlement between the State of Alaska and six of the eight TAPS owners.

4. a. In 1984, and unbeknownst to Arctic, Alaska and certain TAPS owners engaged in settlement negotiations. The first publicly announced settlement offer was withdrawn after Arctic submitted comments to FERC opposing the settlement. Thereafter, Alaska and six TAPS

owners, with the support of the United States Department of Justice, agreed to a second settlement offer. Arctic, the other two TAPS owners, and the Alaska Public Interest Research Group opposed the settlement. Arctic was never allowed to participate in any of the settlement discussions.

The centerpiece of the settlement was the "TAPS Settlement Methodology" ("TSM") for determining maximum rates through the year 2011. The TSM is not cost-based and produces rates for the entire period that are substantially higher than those proposed by Arctic or permitted by the ALJ's initial decision in Phase I; for example, in 1982, Arctic's proposed rate per barrel was \$2.34, the initial decision rate was \$3.08, and the TSM rate was \$6.05. Under the settlement, no settling party can challenge the TAPS owners' rates set pursuant to the TSM. In addition, with respect to the Phase II issues, the settlement provided that approximately 25% of the contested amount of the cost of construction would be excluded from the TAPS rate base but recovered through depreciation. The settlement also contained a pooling arrangement that allowed the TAPS owners to reallocate fixed costs as though they were variable. Finally, the settling TAPS owners agreed to pay refunds for the rates charged during the period 1982-1985 and to reimburse Alaska for its litigation expenses.

The settling parties moved the ALJs to sever Arctic from the proceedings and to certify the settlement to FERC as an "uncontested" offer of settlement under FERC Rule 602(g), 18 C.F.R. § 385.602(g), which provides that "[a]n uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest" (App., *infra*, 87a). The ALJs, noting that Arctic vigorously contested the settlement and that extensive proceedings had already been conducted, denied the motion as "feckless" (C.A. Supp. App. 212-213).

However, they subsequently certified the proposal to the Commission as a *contested* settlement "without dealing at this level with the technical intricacies" of FERC's rules on the resolution of disputed factual issues (App., *infra*, 67a).

b. On October 23, 1985, FERC approved the six-carrier settlement as *uncontested* under Rule 602(g), finding that it was fair and reasonable and in the public interest. App., *infra*, 54a-64a. Stating that the settlement was a "comprehensive, long-term settlement of complex issues in a hotly contested, lengthy and expensive proceeding," the Commission concluded that such settlements "are to be encouraged" and that "the settling parties are entitled to the benefits of their bargain" (*id.* at 60a). In addition, the Commission approved the pooling arrangement under Section 5(1) of the Interstate Commerce Act (49 U.S.C. § 5(1)), concluding that it was part of an overall settlement that met the statutory requirements for pooling agreements (App., *infra*, 63a).

Although it approved the proposed settlement as to the settling parties, the Commission "[n]onetheless * * * acknowledge[d] the concerns of the nonsettling parties" (App., *infra*, 60a) and stated that it was not "imposing the terms of the Settlement Agreement on any nonsettling party" (*id.* at 60a n.17). Accordingly, it remanded the case to the ALJs "to allow the nonsettling parties a hearing only on those issues which apply to them" (*id.* at 60a).

c. While the case was on remand, the remaining two TAPS owners agreed to the terms of the six-carrier settlement. On that basis, the ALJs certified the settlement proposal for the Commission's consideration with respect to all eight TAPS owners. App., *infra*, 45a-49a.

d. FERC approved the settlement for the two additional TAPS owners as an uncontested settlement pursuant to Rule 602(g). App., *infra*, 22a-44a. In order to treat the settlement as uncontested, the Commission dis-

missed Arctic from the proceeding on the ground that it was not "particularly 'aggrieved'" (*id.* at 36a) by the TAPS rates and therefore lacked "standing" under judicial principles for standing in federal court (*ibid.*). Although acknowledging Arctic's claim that excessive TAPS rates have a present effect on the value of its lands and leasing rights (*id.* at 37a), the Commission believed that this interest was not sufficiently "direct" or "immediate" to confer standing because "[a]t present * * * Arctic neither ships oil through TAPS nor does it have a royalty interest in any oil being shipped via TAPS" (*ibid.*). In the Commission's view, Arctic had only a "contingent, potential future interest" since its oil was unlikely to be shipped before the early to mid-1990s (*ibid.*).

Because it concluded that Arctic had no cognizable present interest in TAPS rates, the Commission found that Arctic was adequately protected by the future availability of FERC procedures for determining just and reasonable rates at such time as Arctic's oil began to be shipped. Noting that it was not "imposing the settlement on Arctic" (App., *infra*, 26a), the Commission stated that "[i]f and when Arctic is actually aggrieved, it may contest TAPS' rates" (*id.* at 43a), and "[t]he carriers cannot rely on the approved settlements to establish the justness of [future rates] since the settlement rates were never adjudicated to be just and reasonable" (*id.* at 26a n.17).

Based on its dismissal of Arctic and the approval of the settlement among the remaining parties, the Commission terminated the TAPS dockets and closed the inquiry into the lawfulness of the TAPS rates.

5. The court of appeals upheld FERC's order, although not on the rationale adopted by the Commission. App., *infra*, 1a-19a.

The court of appeals disagreed with the Commission on the central issue whether Arctic was sufficiently ag-

grieved to have standing. In line with the earlier ruling of a motions panel,³ the court below expressly rejected the argument that "Arctic has no standing to challenge the settlement because * * * [it] has suffered no present aggrievement" (App., *infra*, 10a n.10). As the court explained (*ibid.*):

[T]he allegations of present injury on the part of Arctic suffice to satisfy the Hobbs Act jurisdictional (and the separate constitutional) requirements of injury in fact necessary to accord a party standing. In particular, Arctic persuasively contends that excessive present and future tariffs adversely affect both the wellhead value of its oil, and its lease bonus and royalty interests. Although [respondents] challenge the "extent" of this injury, * * * [there is] a sufficient present injury to satisfy jurisdictional prerequisites.

Thus, the court made clear "that the settlement currently affects Arctic's interests" (*id.* at 17a) and has an "assuredly real * * * impact" on Arctic (*id.* at 18a n.20).

Notwithstanding that holding, however, the court of appeals affirmed FERC's order. The court recognized that the Commission had rested its dismissal of Arctic on the *legal conclusion* that Arctic had "no present aggrievement" (App., *infra*, 8a) and had approved the settlement as *uncontested* pursuant to Rule 602(g) (*id.* at 7a-8a). Nevertheless, the court held that the Commission had "*discretion*" (*id.* at 17a-18a n.20 (emphasis added)) to take such action under Rule 602(h) on *contested* settlements (*id.* at 11a, 17a).

The court found that the Commission's order constituted "appropriate" action within the meaning of Rule

³ The TAPS owners initially moved to dismiss Arctic's petition for review on the ground that Arctic was not aggrieved and therefore lacked standing to appeal. A motions panel of the D.C. Circuit (Edwards and Bork, JJ.) denied the motion to dismiss. App., *infra*, 20a-21a.

602(h) because it left a remedy to Arctic “*in the future*” (App., *infra*, 17a (emphasis in original)) :

[I]t is appropriate for the Commission * * * to serve [Arctic’s present] interests by not forcing the settlement upon Arctic and by preserving possible future challenges for a riper moment.

Ibid. Because the settling parties “have the most direct and immediate interest” in the TAPS rates (*ibid.*), and “in light of Arctic’s currently less direct interest in rates than it may well have at some later time” (*id.* at 18a n.21), the court concluded that it was not “inappropriate” for the Commission to “relegat[e] Arctic to a future proceeding” to obtain a determination of the lawfulness of TAPS rates (*id.* at 17a n.19). By severing Arctic and consigning it to a future remedy, the Commission served “the general policy favoring settlement of administrative proceedings” (*id.* at 14a) and promoted the “public-interest considerations” supporting “settlement of these extraordinarily complex and burdensome proceedings” (*id.* at 11a).

By the court’s own admission, its decision “that Arctic can properly be left out in the cold for the moment” was an “unhappy conclusion” (App., *infra*, 18a). The court acknowledged both “Arctic’s frustration with the labyrinthine regulatory process in which it has participated” and “the force of some of its arguments” (*id.* at 10a). And the court conceded that it appeared “curious that a party who participated fully in the litigation for nine years could at the end be told that its interest is not immediate enough to challenge the settlement” (*id.* at 18a n.21) and “odd” that FERC “would elect to conclude a nine-year long proceeding without reaching the merits” (*id.* at 16a). However, because it was “unable to discern any insurmountable impediment” to the Commission’s order (*id.* at 10a), the court felt “constrained” (*id.* at 18a) to hold that “the Commission’s action is within lawful bounds” (*id.* at 2a).

REASONS FOR GRANTING THE PETITION

Without question, the TAPS ratemaking proceeding is of considerable public importance. TAPS revenues are as great as the combined revenues of all other oil pipelines in the United States. See *Farmers Union*, 734 F.2d at 1494 n.21. TAPS rates will have a critical effect on the development and cost of oil from the Alaska North Slope, an energy resource vital to our nation's economy and security. As FERC itself has noted, "TAPS moves enormous quantities of oil" and its rates are "of real moment to ultimate consumers." *Trans Alaska Pipeline System*, 21 F.E.R.C. (CCH) § 61,092 at 61,285 (1982).

In addition, TAPS rates have a direct and immediate impact on Alaskan Natives. In order to promote the development of Alaska's oil resources, Congress enacted ANCSA, which extinguished the Natives' aboriginal title and in return compensated them with land to generate revenues to meet their "real economic and social needs" (43 U.S.C. § 1601(b)). See, e.g., H.R. Rep. No. 523, 92d Cong., 1st Sess. 6 (1971) (compensation reflected "the need for adequate resources to permit the Natives to help themselves economically"); *id.* at 16 (Secretary of the Interior Morton) (lands will "provide the natives with a permanent economic future in the State"). The value of the Natives' oil lands and leasing rights is thus integral to the ANCSA scheme. It is this interest that Arctic seeks to protect and that the decisions of FERC and the court of appeals frustrate. Moreover, because the other regional corporations share in 70% of the net revenues Arctic earns from many of its oil leases (see 43 U.S.C. § 1606(i)), the adverse rulings below affect all Alaskan Natives.

The questions presented in this case concern the fundamental fairness of the TAPS proceeding and the proper exercise of judicial review of FERC's actions. The issue of who can contest TAPS rates, and when, is crucial to

realizing the mandate of the Interstate Commerce Act that charges be "just and reasonable" (49 U.S.C. § 1(5)). As this Court explained in *TAPS I*, it is a virtual certainty that producers and shippers of Alaskan oil will not challenge TAPS rates, for they

are almost exclusively parents or co-subsidaries of TAPS owners. Thus, to an indeterminate, but possibly large extent, excess transportation charges to shippers will be offset by excess profits to TAPS owners, creating a wash transaction from the standpoint of parent oil companies. Indeed, it is telling that no shipper of oil protested the TAPS rates.

436 U.S. at 644. Likewise, the settlement in this case bars the State of Alaska from contesting the terms of the agreement or the rates set by the TAPS Settlement Methodology; what is more, Alaska's interest diverged from that of Arctic and the Alaskan Natives since, in return for agreeing to TSM rates that are not cost-based, the State received several hundred million dollars for overcharges on shipments during the period 1982-1985 as well as \$35 million in reimbursement for its litigation expenses. See C.A. App. 473, 513.

Realistically, therefore, only the Alaska Native Regional Corporations can be expected to challenge TAPS rates. Despite this singular role, however, the decisions below preclude the regional corporations from mounting a rate challenge until such time as their oil is actually being shipped, which will not occur before the 1990s and may never occur if excessive TAPS rates render their lands uneconomical to develop. Hence, the consequence of this case, if it is not reviewed by the Court, is that TAPS rates—rates that are alleged to be unlawful and whose legality FERC has never resolved—will be effectively immune from challenge. The court of appeals correctly held that Arctic has standing because it is currently aggrieved by high TAPS rates, and, as this litigation amply demonstrates, Arctic's stake ensures that it

will vigorously pursue the objective of just and reasonable rates. To foreclose it from proceeding for the indefinite future injures Arctic's economic interests under ANCSA and is inimical to national energy policy.

Two issues are raised in this petition. The first is whether FERC can approve a settlement over the objections of an aggrieved party without resolving the merits of the dispute. As we show below, such a "cram down" of a settlement is a clear violation of the Due Process Clause, the Interstate Commerce Act, and FERC regulations. The D.C. Circuit's decision, allowing FERC to approve a contested settlement without an adjudication on the merits, conflicts with decisions of this Court and of other courts of appeals; and even apart from that conflict, the unique position of the D.C. Circuit in formulating principles of administrative law and overseeing the work of federal agencies makes the decision below a significant one. Because the propriety of forced settlements is an important and recurring issue, and because courts and agencies are under increasing pressure to settle litigation, the question of the rights of objecting parties warrants this Court's review.

The second issue in this case is whether the court of appeals erred in affirming FERC's order on a rationale that the agency itself had not adopted: while FERC had approved the settlement as *uncontested* after dismissing Arctic on the *legal ground* that it lacked standing, the court of appeals—although overturning the agency on the central question of Arctic's standing—sustained FERC's action as an appropriate exercise of *discretion* to approve a *contested* settlement. By inventing a theory that FERC has never suggested or adopted, the court departed from the cardinal rule of judicial review that agency action may be upheld only on the basis on which the agency relied.

Because the latter error of the court of appeals is manifest, the Court may wish to consider summary reversal of the judgment below. See, e.g., *Consolidated Rail Corp. v. Recycling Indus.*, 449 U.S. 609 (1981) (per curiam); *Long Island R. Co. v. Aberdeen & Rockfish R. Co.*, 439 U.S. 1 (1978) (per curiam). Accordingly, we begin with that issue.

I. THE COURT OF APPEALS ERRED IN UPHOLDING FERC'S ORDER ON A GROUND THAT THE AGENCY HAD NOT ADOPTED

It is a "well established" axiom of administrative law that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Veh. Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 50 (1983). This Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner" (*id.* at 48), and courts "may not supply a reasoned basis for the agency's action that the agency itself has not given" (*id.* at 43). The Court has never varied from the "simple but fundamental rule of administrative law" that

a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947). See also, e.g., *ICC v. Brotherhood of Locomotive Engineers*, 107 S.Ct. 2360, 2368 (1987); *id.* at 2371-2372 (Stevens, J., concurring).

This settled doctrine reflects the fundamental allocation of responsibilities between federal courts and administrative agencies and the proper role of judicial review of agency action.

For the courts to substitute their * * * discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate * * *, the administrative process, for the purpose of the rule is to avoid "propel[ing] the court into the domain which Congress has set aside exclusively for the administrative agency."

Burlington Truck Lines v. United States, 371 U.S. 156, 169 (1952). The complementary concepts of "the integrity of the administrative process" (*NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 444 (1965)) and the "responsibility" and "accountability" of the agency (*Bowen v. American Hosp. Ass'n*, 106 S.Ct. 2101, 2113, 2121 (1986) (plurality opinion)) require that courts limit their review to "the rationale adopted by the agency * * *. Only in that way may [they] 'guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.'" *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973).

The application of these principles to this case is straightforward. There is no dispute, and the court of appeals correctly understood, that FERC had dismissed Arctic from the proceeding for lack of standing and then approved the settlement among the remaining parties as uncontested pursuant to Rule 602(g). Nonetheless, the court, although reversing FERC's ruling on the legal issue of standing, upheld the agency's order as a proper exercise of administrative "discretion" (App., *infra*, 17a-18a nn.20, 21) to take appropriate action to approve a contested settlement under Rule 602(h) (*id.* at 11a, 17a). Whether or not "FERC could choose within its sound discretion" (*id.* at 18a n.21) to act as it did (a point we dispute below), it is quite clear that the agency did not in fact invoke such discretion in dismissing Arctic as unaggrieved and approving the uncontested settlement. In these circumstances, the court improperly sub-

situted its judgment for that of FERC by exercising a discretion that Congress vested in the agency alone.

Since FERC's rejection of Arctic's standing constituted "an error of law," it was the court of appeals' "duty * * * to correct the error . . ., and after doing so to remand the case to the [agency] so as to afford it the opportunity of * * * [proceeding] as required by law." *National Ass'n of Greeting Card Pubs. v. USPS*, 462 U.S. 810, 825 n.19 (1983). This the court of appeals failed to do. Accordingly, the judgment below should be summarily reversed, and the case remanded for further administrative proceedings.

II. APPROVAL OF A SETTLEMENT OVER THE OBJECTIONS OF AN AGGRIEVED PARTY, WITHOUT RESOLVING THE DISPUTE ON THE MERITS, VIOLATES THE DUE PROCESS CLAUSE, THE INTERSTATE COMMERCE ACT, AND FERC REGULATIONS

The court of appeals held that the Commission may approve a settlement over the objections of an aggrieved party without resolving the merits of the dispute. Under the decision below, a hotly contested and objectionable settlement may be transformed into a so-called "uncontested" settlement by the simple device of cavalierly excluding a proper party from the case. The stated justification for thus ignoring the interests of an adversely affected party is the "policy favoring settlement of administrative proceedings" (App., *infra*, 14a). To sacrifice the rights of a party to the expediency of settling the proceeding, as the court of appeals has sanctioned, violates the Due Process Clause, the Interstate Commerce Act, and FERC's own regulations.

A. The Due Process Clause Prohibits FERC From Dismissing A Currently Injured Party And Approving A Contested Settlement Without Resolving The Dismissed Party's Objections On The Merits

The court of appeals correctly recognized that Arctic is suffering "present injury" because excessive TAPS rates "adversely affect" the value of its oil holdings and leas-

ing rights (App., *infra*, 10a n.10). Thus, the settlement "currently affects Arctic's interests" (*id.* at 17a) and has an "assuredly real * * * impact * * * on Arctic" (*id.* at 17a-18a n.20). For a court or agency to dismiss an aggrieved party from a proceeding that directly affects its interests, without ruling on the merits of its claim, is an elemental deprivation of due process.

As this Court has explained, "[f]or more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Moreover, because "[i]t is equally fundamental that the right to * * * an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner,'" the required hearing must be held "at a time when the deprivation can still be prevented" (*id.* at 80, 81). Thus, "[t]he right to a prior hearing has long been recognized by this Court * * *. '[The] root requirement [of due process is] that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest * * *'" (*id.* at 82 (emphasis in original)). See also, *e.g.*, *Bell v. Burson*, 402 U.S. 535, 541-542 (1971).

Due process can, of course, make proceedings more expensive and protracted. We recognize the general public interest in resolving disputes through settlements voluntarily reached by all parties. Indeed, Arctic would have joined the settlement in this case if certain modifications were made, which the State of Alaska accepted but the TAPS owners rejected. App., *infra*, 46a.

Absent unanimous consent, however, the general policy in favor of settlements provides no basis for running roughshod over Arctic's rights. Due process "recognizes higher values than speed and efficiency" (*Fuentes v. Shevin*, 407 U.S. at 90 n.22), and "the prospect that a hearing may be long does not justify its denial if it is required by the essential demands of justice." *Atchison, T. & S.F.R. Co. v. United States*, 284 U.S. 248, 262

(1932). Under the Due Process Clause, “[t]here can be no compromise on the footing of convenience or expediency” where the “minimal requirement” of a hearing—“one of ‘the rudiments of fair play’”—is “neglected or ignored.” *Ohio Bell Tel. Co. v. Public Util. Comm’n*, 301 U.S. 292, 304-305 (1937).

We take it as clear—indeed, it is indisputable—that FERC could not have approved a settlement that would be binding on Arctic over its objections. See, e.g., *National Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940); *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 476 (1918). The court of appeals thought that its decision did not run afoul of this principle because the settlement was not imposed on Arctic or determinative of its rights, thereby leaving Arctic free in the future to resort to FERC’s ratemaking procedures if and when its oil was being shipped through TAPS. It was sufficient, the court believed, that the settlement ensure the “efficacy of this future remedy” by “preserv[ing]” Arctic’s challenges and allowing it to “return to the Commission when the impact of TAPS rates upon it is more concrete and substantial” (App., *infra*, 16a, 19a).

That reasoning, however, ignores the fact that, as the court itself held, dismissal of Arctic from the proceeding and approval of the settlement *did* have a *present* adverse effect on Arctic. Without affording Arctic a hearing to resolve its contention that TAPS rates are unlawful, the court deprived Arctic of its current interest in deriving the full value of its ANCSA lands and sustained a FERC order that threatens to prevent Arctic from *ever* developing its substantial holdings in marginal oil fields. This harm to Arctic is irreparable: its present and continuing injury cannot be cured by a future determination of just and reasonable rates. Cf. *First English Evan. Luth. Ch. v. Los Angeles Cty.*, 107 S.Ct. 2378 (1987).

Thus, “the remedy provided to Arctic *in the future*” (App., *infra*, 17a (emphasis in original)) is no substitute for the remedy required by the Constitution here and now. The fact that the court characterized the TAPS

owners as having a more "direct and immediate interest" (*ibid.*) in TAPS rates than Arctic, or that Arctic's interest in the rates is "currently less direct" than it might be "at some later time" (*id.* at 18a n.21), does not justify or excuse the present infringement of Arctic's right to due process. To dismiss Arctic from the proceeding without ruling on its claims, thus leaving it aggrieved by allegedly excessive rates *at this point*, is just as much a denial of due process as the binding imposition of the settlement would have been.

B. The Interstate Commerce Act And FERC's Regulations Do Not Permit The Approval Of A Settlement Over The Objections Of An Aggrieved Party

In addition to this constitutional violation, neither the Interstate Commerce Act nor FERC's regulations permit the approval of a settlement over the opposition of an aggrieved party. If a party's current interest is adversely affected, FERC is required to provide an immediate procedure for resolving its claims on the merits and may not, as the court of appeals' decision allows, simply "relegat[e it] to a future proceeding" (App., *infra*, 17a n.19). Moreover, the decision below conflicts with decisions in other circuits that recognize that the Commission must rule on the merits of such objections in order to approve a contested settlement.

1. The Interstate Commerce Act Requires FERC To Decide The Merits Of An Aggrieved Party's Complaint That Pipeline Rates Are Unlawful

In clear and unambiguous terms, the Interstate Commerce Act directs that "[a]ll charges * * * shall be just and reasonable" and that "every unjust and unreasonable charge * * * is prohibited and declared to be unlawful" (49 U.S.C. § 1(5)). The central means for enforcing this provision is contained in Section 13, which provides that "[a]ny person" may petition the Commission to complain of a violation of the Act (49 U.S.C. § 13(1)). If there "appear[s] to be any reasonable ground for investigating said complaint, *it shall be the*

duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper" (*ibid.* (emphasis added)). The statute buttresses this enforcement scheme by further stating that "[n]o complaint shall at any time be dismissed because of the absence of direct damage to the complainant" (49 U.S.C. § 13(2)).

By the plain language of Section 13, therefore, FERC is under a "duty" to investigate alleged violations of the Act if there is "any reasonable ground" for doing so upon the complaint of "any person." This Court has long recognized the mandatory duty that the statute imposes on the Commission. In *ICC v. Baird*, 194 U.S. 25 (1904), the Court held that, even where "the complainant before the commission did not show any real interest in the case" (*id.* at 39), "*no alternative is left the commission but to investigate the complaint*, if it presents matter within the purview of the act and the powers granted to the Commission" (*ibid.* (emphasis added)).⁴ More recently, in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454 (1979), the Court reiterated that a Section 13 complaint "require[s] the Commission to investigate the lawfulness of any rate at any time" and that "any decision not to do so" is subject to judicial review. See also *id.* at 450 (ICC stated that § 13 provides for "*mandatory* posteffective proceedings to inquire into and remedy violations of the Act") (emphasis added); *Amalgamated Util. Workers v. Consolidated Edison Co.*, 309 U.S. 261, 269 (1940) (§ 13(1) "affords 'a private administrative remedy,'" and an "interested person can file as of right a complaint before the Interstate Commerce Commission").

⁴ FERC sought to distinguish *Baird* on the ground that it "merely recognizes the possibility of indirect damage" but "in no way bars a dismissal where, as here, there is no immediate damage" (App., *infra*, 40a n.51). Whatever its validity otherwise, that attempted distinction does not survive the court of appeals' holding that Arctic suffered present injury.

The court of appeals' decision is flatly inconsistent with the Commission's statutory obligation under Section 13—a section that is “one of [the Act's] * * * most frequently used provisions” (*Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. at 457). The court's decision permits FERC to terminate a ratemaking investigation and dismiss a complaint even though an aggrieved party is challenging the lawfulness of rates. An investigation was commenced in this case (and an initial suspension was ordered under 49 U.S.C. § 15(7)) based on the determination that “there is reason to believe the proposed rates are not just and reasonable” and that “the protestants have made a showing of probable unlawfulness.” *Trans Alaska Pipeline System*, 355 I.C.C. at 81, 82. Just as the Commission could not have ignored Arctic's complaint at the outset by refusing to begin an investigation, it equally could not short circuit Arctic's complaint by ending the investigation without a ruling on the merits of the legality of the TAPS rates.

The court of appeals' only response to Arctic's contention was that the proceeding into the lawfulness of the TAPS rates was being conducted under Sections 15(1) and 15(7) of the Interstate Commerce Act (49 U.S.C. §§ 15(1) and 15(7)) rather than under Section 13 (App., *infra*, 12a & n.13). That conclusion reflects a fundamental confusion about the structure of the Act. Section 13, which was part of the Interstate Commerce Act of 1887, established an enforcement mechanism for private parties to obtain a determination of the justness and reasonableness of rates. If rates were found to be unlawful, the original Act allowed the ICC to enter cease-and-desist orders. It did not, however, authorize the ICC affirmatively to prescribe the legal rate (or maximum and minimum legal rates) for carriers to charge. Accordingly, in the Hepburn Act of 1906, Congress conferred that power on the Commission under Section 15(1). In addition, the Commission had no authority to act until after rates had already taken effect and the public had been subjected to the allegedly illegal charges; the Mann-Elkins

Act of 1910 corrected this defect by granting the Commission the power in Section 15(7) to suspend proposed rates. See, *e.g.*, *TAPS I*, 436 U.S. at 639-642.

It is thus clear that Section 15(1) and 15(7) do not, as the court of appeals believed, create an alternative administrative procedure for complainants to pursue. Rather, they provide additional remedies to "augment[]" (*TAPS I*, 436 U.S. at 641) the enforcement mechanism established in Section 13 of the original Act. Indeed, the text of Section 15(1) makes clear this interrelation among the provisions by authorizing the Commission to order relief for unlawful rates "upon a complaint made *as provided in section 13*" (49 U.S.C. § 15(1) (emphasis added)). See also *Alexander Sprunt & Son v. United States*, 281 U.S. 249, 258-259 (1930) (rates are subject to challenge "in a proceeding before the Commission instituted under sections 13 and 15," and complainants "have their remedy before the Commission under sections 13 and 15"). Moreover, because there is no requirement that the complainant or the Commission expressly cite Section 13 in order to invoke that provision (see, *e.g.*, *Chicago, R.I. & P. Ry. Co. v. United States*, 274 U.S. 29, 36-37 (1927); *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U.S. 654, 659, 662 (1931)), the court of appeals erred in relying on the absence of any such explicit reference in concluding that Section 13 was not involved in this case (App., *infra*, 12a n.13).⁵

⁵ The Court has recognized that the Commission has unreviewable discretion under other provisions of the Interstate Commerce Act, where the statutory language is permissive rather than mandatory or where it would be a practical impossibility to require Commission action. See, *e.g.*, *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, *supra* (decision not to investigate seasonal rates under 49 U.S.C. § 15(8)); *Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289 (1975) (decision whether to suspend or investigate the suspension of rates under 49 U.S.C. § 15(7)); *Arrow Transp. Co. v. Southern Ry. Co.*, 372 U.S. 658 (1963) (same). Those decisions, however, in no way support the court of appeals' sweeping conclusion that "the Commission enjoys unreviewable discretion to determine whether to initiate section 15 investigations at all" (App., *infra*, 12a).

Indeed, FERC's refusal to resolve the lawfulness of the TAPS rates was especially improper in the circumstances of this case. At the time the investigation was terminated, extensive administrative proceedings had been underway for nearly a decade. The Phase I record had been completed, and an ALJ initial decision had been rendered and appealed to the Commission; the Phase II record likewise had been closed, opening briefs had been filed before the ALJs, and reply briefs were being drafted. Having come this close to resolving the ratesetting methodology for the life of TAPS, however, FERC set these efforts for naught by concluding the proceeding without a decision. That action was inconsistent with the requirements of the statute and improperly frustrated the legitimate interests of both Arctic and the public in obtaining a determination of the legality of TAPS rates. See *City of Chicago v. United States*, 396 U.S. 162, 166 (1969); *Wisconsin v. FPC*, 373 U.S. 294, 311 (1963); *Minneapolis Gas Co. v. FPC*, 294 F.2d 212, 215 (D.C. Cir. 1961).⁶

2. FERC's Regulations Require That The Commission, In Approving A Contested Settlement, Resolve An Aggrieved Party's Objections On The Merits

FERC's regulations likewise do not permit the Commission to approve a settlement over the objections of an

⁶ In addition, the decisions below are incorrect for another reason with respect to the pooling arrangement under the settlement. While FERC approved the rate provisions as a settlement, 49 U.S.C. § 5(1) requires that the pooling agreement be approved on the merits, and the Commission did so here (App., *infra*, 42a-43a & n.58, 63a, 64a). However, in granting substantive approval, the Commission erred by not considering the merits of the pooling arrangement apart from the overall settlement to determine whether the pooling provision itself satisfied the requirements of the statute. Thus, whatever the correctness of the rulings of the court of appeals and FERC relegating Arctic to a future rate challenge because the Commission had not approved TAPS rates, that reasoning is simply inapplicable to the pooling agreement, which the Commission did approve—albeit erroneously—on the merits.

aggrieved party. In fact, FERC has consistently declined to take such an action. In adopting a contested settlement, the Commission must hear the nonconsenting party's opposition on the merits.

FERC's regulations clearly distinguish between uncontested settlements (which are covered by Rule 602(g), 18 C.F.R. § 385.602(g) (App., *infra*, 87a)) and contested settlements (which fall under Rule 602(h), 18 C.F.R. § 385.602(h) (App., *infra*, 87a-89a)). Although FERC approved the settlement here as uncontested under Rule 602(g) on the legally erroneous ground that Arctic lacked standing, the court of appeals held that the Commission's action was an appropriate disposition of a contested settlement under Rule 602(h)(1)(ii)(B). This is a plain misreading of the text, structure, and history of Rule 602.

Rule 602(h) clearly contemplates that the Commission will resolve the merits of contested settlements (or of those portions of a settlement that are contested). Rule 602(h)(1)(i) authorizes the Commission to "decide the merits of the contested settlement issues" if either "the record contains substantial evidence" for a decision or there is "no genuine issue of material fact." This provision enables the Commission to "render a decision on contested issues on the basis of substantial record evidence, consistent with the requirements of due process." 43 Fed. Reg. 32814, 32815 (1978). At the same time, under Rule 602(h)(1)(iii), any issues that are not contested may be severed and treated as an uncontested settlement pursuant to Rule 602(g). In contrast to the requirements of Rule 602(h) for a contested settlement, Rule 602(g) "is clear * * * that substantial evidence is not required as support for unopposed offers of settlement" because they do not entail a decision on the merits. 44 Fed. Reg. 34936, 34939 (1979).

If there is no adequate factual basis for FERC to decide the contested issues on the merits, Rule 602(h) states that the Commission "will * * * [e]stablish pro-

cedures for the purpose of receiving additional evidence before [an ALJ]" (Rule 602(h) (1) (ii) (A)) or—in the provision upon which the court of appeals relied—"will * * * [t]ake other action which the Commission determines to be appropriate" (Rule 602(h) (1) (ii) (B)). In the court's view, subsection B "trumpet[s]" "sweeping" authority in the Commission to take any settlement action that it finds "appropriate" (App., *infra*, 11a).

The court of appeals' decision would give FERC largely unlimited discretion to convert contested settlements into uncontested ones by ordering the dismissal of the objecting parties as "appropriate" in order to settle the case. As a matter of both legal analysis and common sense, that self-evidently is not a correct understanding of the Rule. Rather, the language, context, and background of Rule 602(h) show that subsection B was designed as a residual source of procedural flexibility for the Commission to take "appropriate" action, other than a remand to an ALJ for a factual hearing under subsection A, to develop an adequate record for rendering a decision on the merits. The purpose of subsection B manifestly was not to circumvent the procedure for resolving the merits of contested issues; as FERC itself explained the regulation:

If substantial evidence is lacking * * * [for deciding contested settlement issues], the Commission may order proceedings before a Presiding Officer for receiving substantial evidence upon which a decision can reasonably be based *or other appropriate procedures*.

44 Fed. Reg. 34936, 34938 (1979) (emphasis added).

Both the court of appeals (App., *infra*, 8a, 11a, 17a n.19) and the Commission (*id.* at 27a, 32a-33a, 55a n.3) placed great weight on the decision in *United Municipal Distributors Group v. FERC*, 732 F.2d 202 (D.C. Cir. 1984). In that case, FERC severed a party that objected to part of a settlement under the Natural Gas Act and

then approved the uncontested agreement among the other parties. For the reasons stated above, we disagree with *United* to the extent it is read to establish broad discretionary power in the Commission to deprive an aggrieved party of an effective remedy based on the expediency of approving a settlement.

But that is not in fact what *United* held. In *United*, the objecting party, after being severed from the settlement, was granted an immediate hearing to resolve its allegations on the merits—exactly the same hearing that would have been conducted for all of the parties in the absence of the settlement. Because the nonconsenting party was given its “legally prescribed remedies” (732 F.2d at 210 n.12) for the adjudication of its claims, it was free to litigate its complaint then and there, and its injury was not left unredressed. This is how the Commission understood *United*. App., *infra*, 27a (“in *United* * * * the objecting parties were entitled to an immediate hearing on the merits * * * because those parties had immediate interests”). Here, in sharp distinction, the court of appeals’ decision does not allow Arctic to pursue its legally prescribed remedies or provide it with an immediate and effective avenue for relief from the present harm that, as the court itself held, renders it aggrieved. In other words, Arctic is seeking precisely the remedy that was afforded in *United* but denied in this case. *United*, therefore, does not sustain the decision below depriving Arctic of a current remedy and “relegating [it] to a future proceeding” (App., *infra*, 17a n.19).

In its rulings in this case, FERC did not purport to be able to withhold a hearing from an aggrieved party. On the contrary, it clearly indicated that Arctic would be entitled to a hearing in the future when, under the Commission’s erroneous standing requirement, Arctic would first be aggrieved. App., *infra*, 27a, 39a, 43a. Nor has FERC denied hearings to aggrieved parties in other cases by approving settlements over their objections. Quite the opposite, the Commission has consistently refused to ap-

prove such settlements and required that a hearing be held.⁷ To our knowledge, FERC has *never* asserted or exercised—and, as discussed above, lawfully could not do so—the unbridled power that the court of appeals' decision has conferred upon it to divest an aggrieved party of its right to a hearing and decision on the lawfulness of challenged rates.

3. *Judicial Decisions Establish That FERC Must Decide An Aggrieved Party's Objections On The Merits In Order To Approve A Contested Settlement*

The erroneous decision of the court below conflicts with decisions of other courts of appeals. In line with the foregoing analysis, those decisions demonstrate that the Commission is required to resolve contested settlements on the merits and cannot accept a settlement *qua* settlement over the objections of an aggrieved party.

In *New Orleans Public Service v. FERC*, 659 F.2d 509, 511-512 (5th Cir. 1981), for example, the Fifth Circuit stated as a "well settled" principle that "the Commission can approve contested settlements *as long as it determines that the proposal will establish just and reasonable rates*" (emphasis added). Likewise, in *In re Hugoton-Anadarko Area Rate Case*, 466 F.2d 974, 981 (9th Cir. 1972), the Ninth Circuit, after referring to the Commission's statement that a contested settlement proposal "must be considered on its merits," held that the Commission could "accept the settlement proposal over [parties'] objections" because it "deal[t] with the settlement proposal on the merits" and "rendered a decision, based on findings which it believed were supported by substantial evidence, prescribing lawful rates." And in *South Dakota Pub. Util. Comm'n v. FERC*, 668 F.2d 333, 336 (8th Cir. 1981), the Eighth Circuit, recognizing that a contested settlement constitutes a resolution of the merits,

⁷ See *Trunkline Gas Co.*, 22 F.E.R.C. (CCH) ¶ 61,011 (1983); *Northern Natural Gas Co.*, 35 F.E.R.C. (CCH) ¶ 61,105 (1986); *Natural Gas Pipeline Co.*, 39 F.E.R.C. (CCH) ¶ 61,149 (1987).

explained that “[a] final Commission decision on a contested settlement must be supported by substantial evidence.”

Indeed, in every other case of which we are aware, the Commission has treated its approval of a contested settlement over the objections of an aggrieved party as a decision on the merits. The leading illustration is *Mobil Oil Corp. v. FPC*, 417 U.S. 283 (1974). There, the Commission accepted a contested settlement in establishing just and reasonable rates; as the Fifth Circuit explained, “[a]lthough the lack of unanimity of support from some of the various parties precluded the possibility of its functioning as a settlement in the traditional sense, FPC adopted it as a decision on the merits.” *Placid Oil Co. v. FPC*, 483 F.2d 880, 893 (5th Cir. 1973). This Court expressly approved the analysis of the court of appeals that “even if there is a lack of unanimity, it may be adopted as a resolution *on the merits*, if FPC makes an independent finding supported by ‘substantial evidence on the record as a whole’ that the proposal will establish ‘just and reasonable’ rates” (417 U.S. at 314, quoting 483 F.2d at 893 (emphasis in original)). Reviewing courts have consistently recognized that the Commission’s approval of a contested settlement represents a determination on the merits. See, e.g., *Mississippi River Transmission Corp. v. FERC*, 759 F.2d 945, 951-952 & n.7 (D.C. Cir. 1985); *FERC v. Triton Oil & Gas Corp.*, 712 F.2d 1450, 1458 (D.C. Cir. 1983).

The ruling below cannot be squared with these authorities. The court of appeals has allowed the Commission to approve contested settlements without resolving the merits of the objections raised by aggrieved parties. A heretofore uniform line of decisions in several circuits has recognized that such an action is impermissible, and indeed FERC itself has not claimed to have that power in this case or any other. The unprecedented and erroneous decision of the D.C. Circuit will be a continuing

source of confusion in FERC proceedings, will engender controversy in the area of settlements where clarity and certainty are especially important, and will lead to a lack of uniformity among the courts of appeals in reviewing FERC orders. Review by this Court is accordingly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the judgment of the court of appeals with respect to Question 2.

Respectfully submitted.

PAUL M. BATOR

MARK I. LEVY *

Mayer, Brown & Platt
190 South La Salle Street
Chicago, Illinois 60603
(312) 782-0600

O. YALE LEWIS, JR.

RICHARD A. CURTIN

Hendricks & Lewis
2675 First Interstate Center
Seattle, Washington 98104
(206) 624-1933

WILLIAM W. BECKER

Landfield, Becker & Green
1818 N Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 775-0300

Counsel for Petitioner

MAY 1988

* Counsel of Record

APPENDICES

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 86-1115, 86-1427

ARCTIC SLOPE REGIONAL CORPORATION,
Petitioner,
v.

FEDERAL ENERGY REGULATORY COMMISSION, and
UNITED STATES OF AMERICA,
Respondents,

STATE OF ALASKA, AMERADA HESS PIPELINE CORP.,
ARCO PIPE LINE COMPANY, EXXON PIPELINE CO.,
SOHIO ALASKA PIPELINE CO., UNION ALASKA PIPELINE
CO., BP PIPELINES INC., MOBIL ALASKA PIPELINE CO.,
PHILLIPS ALASKA PIPELINE CORP.,
Intervenors.

ARCTIC SLOPE REGIONAL CORPORATION,
Petitioner,
v.

FEDERAL ENERGY REGULATORY COMMISSION, and
UNITED STATES OF AMERICA,
Respondents,

AMERADA HESS PIPELINE CORP., EXXON PIPELINE CO.,
ARCO PIPE LINE COMPANY, BP PIPELINES INC.,
MOBIL ALASKA PIPELINE CO., UNOCAL PIPELINE CO.,
PHILLIPS ALASKA PIPELINE CORP., STATE OF ALASKA,
SOHIO ALASKA PIPELINE CO.,
Intervenors.

Argued Sept. 22, 1987

Decided Oct. 27, 1987

Before RUTH BADER GINSBURG, STARR and NIES*, Circuit Judges.

Opinion for the Court filed by Circuit Judge STARR.
STARR, Circuit Judge:

These consolidated cases present a challenge to orders by the Federal Energy Regulatory Commission approving a multi-party settlement of extended administrative litigation attacking rates filed by the owners of the Trans Alaska Pipeline System (TAPS). After reviewing the various contentions pressed by the sole remaining party which contested the settlement, we conclude that the Commission's action is within lawful bounds and accordingly deny the petitions for review.

I

The story of the Trans Alaska Pipeline System has been oft repeated and scarcely requires recounting yet again. Suffice it to say that, after the discovery of vast oil reserves on the North Slope of Alaska in 1969, various oil companies constructed an 800-mile pipeline from the Prudhoe Bay field south to the warm water port of Valdez. From rather modest estimates at the outset, TAPS was ultimately completed at a cost of over \$9 billion. Oil started to flow through TAPS in the summer of 1977 and has continued since. TAPS' owners,¹ common car-

* Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a).

¹ The eight owners of TAPS are: Arco Pipe Line Company (ARCO), BP Pipelines Inc. (BP), Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation,

riers under the Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.* (ICA or Act), duly filed their tariff rates with the Interstate Commerce Commission in 1977, as required by law, *see* 49 U.S.C. § 1(1)(b). The rates as filed in 1977 ranged from \$6.04 to \$6.44 per barrel. Promptly thereafter, in June 1977, several parties filed protests and petitions seeking to invoke the Commission's investigatory powers pursuant to sections 15(1) and 15(7) of the Act and challenging the rates as unjust and unreasonable. The parties included the Department of Justice, the State of Alaska, the ICC Bureau of Investigations and Enforcement, and the Arctic Slope Regional Corporation (Arctic), the petitioner in these two cases.

Arctic is a private corporation. It represents the interests of Alaskan natives whose aboriginal claims were extinguished by an act of Congress granting them title to 4.5 million acres of land on the North Slope.² Arctic thus enjoys ownership interests in substantial possible and proven oil reserves, the only possible method of transport for which is TAPS. However, Arctic's interest in TAPS tariffs stems from its ongoing negotiation of exploration leases and the level of bonus and royalty payments it may achieve, sources of compensation that are potentially affected by transportation costs in bringing oil via TAPS to market. Arctic has never shipped any oil through the pipeline; indeed, all agree that Arctic has no realistic possibility of doing so until sometime in the 1990's.

Following the filing of initial rates and the ensuing protests, protracted administrative litigation unfolded before FERC, which on October 1, 1977 stepped into the

Union Alaska Pipeline Company, Sohio Alaska Pipe Line Company (Sohio), and Amerada Hess Pipeline Corporation (Amerada Hess). The owners will be referred to at times as the "Carriers" or "Intervenors."

² Alaska Native Claims Settlement Act of 1971, *codified at* 43 U.S.C. §§ 1601-1628 (1982 & Supp. III 1985).

shoes of the ICC as regulator of oil pipeline rates.³ The rate challenges fell into two categories. First, the challengers objected to the rate setting methodology and proposed rate of return established in the initial filing. Second, the objectors claimed that imprudent costs had been incurred during construction of the pipeline.⁴ Accordingly, the Administrative Law Judge assigned to the case divided the litigation into so-called Phase I and Phase II proceedings to coincide with these two distinct areas of challenge. *See* Brief for Petitioner at 10. The complexity of the issues and the magnitude of the proceedings which followed are dramatically evidenced by the expenditure of hundreds of days of hearings before several ALJs, with over 15,000 exhibits and upwards of 65,000 pages of transcript. *See* Brief for Intervenor at 7.

With the agency proceeding grinding on at a glacial pace, Alaska and two of the TAPS owners, ARCO and BP, entered into settlement negotiations in 1984. From this beginning, Alaska and six of the eight owners managed to reach settlement by July 1985. *See* Settlement Agreement (June 28, 1985), Joint Appendix (J.A.) at 502. (Phillips Alaska, not an original party to the settlement, agreed to join on July 3, 1985, *see* Stipulation Adopting Offer of Settlement (July 3, 1985) (J.A. at 681).) Among other things, the settlement established a complex and comprehensive rate-setting methodology (the TAPS Settlement Methodology or TSM) until the year 2011, the estimated remaining useful life of the pipeline. The settlement further established rate ceilings for the

³ In October 1978, the Interstate Commerce Act was recodified at 49 U.S.C. §§ 10101-11916. However, oil pipelines continue to be regulated under the original Act, and statutory references in this opinion will be to the prior version of Title 49 of the United States Code.

⁴ There were various other issues in both the proceedings, but the primary focus of the litigation was as indicated in text.

life of the pipeline and provided for a substantial refund to the State of Alaska for tariff costs previously incurred. Under the TSM, which is the centerpiece of the settlement agreement, rates are set on an annual basis, and are regarded under the regulatory scheme as any other rate filings by a common carrier. Thus, any such rates are subject to challenge by non-settling parties, such as Arctic, as well as any other non-signatory. Over the long haul, the financial impact of the settlement is two-fold: (1) to "front-end load" the tariffs charged by the owners in the early, pre-settlement years of the pipeline and (2) to provide for diminishing rates beginning with the initial rates filed under the settlement in December 1985.⁵

⁵ The settlement also contains a provision which allows the carriers under some circumstances to reallocate certain costs and revenues among themselves. This provision, Section II-2(f) of the Settlement Agreement, seeks to correct certain inequities that result from the methods of cost recovery under the TSM versus the previous system for allocating costs among the owners. Under this provision, Carriers whose pipeline ownership percentage exceed their terminal ownership percentage are required to make per barrel payments to Carriers whose terminal percentage ownership exceed their pipeline ownership. The need for these payments arises because the recovery of costs under TSM is keyed to barrel-mile share, which does not fully account for those Carriers' costs who own a disproportionately large share of terminal tankage. Another aspect of the reallocation provision corrects potential inequities that may arise if the volume of TAPS throughout falls below capacity. Because costs are charged to Carriers based on percentage of pipeline ownership, but recovered based on barrel miles, if throughput falls below capacity, those owners with disproportionately large percentage ownership would not recover their fair share of the costs. Section II-2(f) seeks to mitigate this potential inequity.

Because this reallocation provision constitutes a pooling arrangement within the meaning of § 5(1) of the ICA, 49 U.S.C. § 5(1), the Carriers applied for specific approval of the arrangement apart from the general settlement. *See* Application for Approval under 49 U.S.C. § 5(1) of an Agreement for the Reallocation of Certain Costs and Revenues (September 3, 1985) (J.A. at 996). The pooling

Blessed with Justice Department approval, this Six-Carrier Settlement Agreement was presented to the various ALJs responsible for the multi-faceted litigation and subsequently was certified by them to the Commission. However, the proposed arrangement was attacked by several parties, namely Arctic, the Alaska Public Interest Research Group (AkPIRG),⁶ and the two remaining non-settling owners, SOHIO and Amerada Hess. The bases for these attacks included assertions that numerous genuine material issues of fact remained and that the settlement established unjust and unreasonable, non-cost based tariffs.

The Commission severed the contesting parties and approved the Six-Carrier Settlement as uncontested on October 23, 1985. *See* October 23 Order, 33 F.E.R.C. (CCH) ¶ 61,064 (S.A. at 220). Buoyed by the Justice Department's support and that of its own staff, the Commission concluded that the settlement was fair and reasonable and in the public interest, as required by its rules. *See* 18 C.F.R. § 385.602(g) (1987). To accommo-

agreement is explained in detail in the September 3, 1985 application. The Commission, pursuant to its statutory responsibilities, approved the arrangement in its October 23, 1985 approval of the settlement. *See* Order Approving Settlement as to Settling Parties, Granting Application, and Remanding Proceedings as to Non-settling Parties (October 23, 1985), 33 F.E.R.C. (CCH) ¶ 61,064 (Supplemental Appendix (S.A.) at 220) (hereinafter referred to as the October 23 Order).

In view of our resolution that Arctic may properly be prevented from challenging the settlement as a whole, we have no occasion in this case to pass on the propriety of the Commission's treatment of the pooling agreement.

⁶ AkPIRG dropped out of the litigation, apparently before the Commission's final order terminating the TAPS proceeding, *see* Order Approving Settlement, Granting Application, Affirming Initial Decision, and Terminating Dockets, 35 F.E.R.C. (CCH) ¶ 61,425, at 61,982 n. 52 (June 27, 1986) (S.A. at 239, 245), and is not a party in this court.

date the interests of the non-settling parties, the Commission remanded the case to the ALJs to consider the non-settling parties' objections and to determine whether the settlement should be imposed upon them. On December 19, 1985, the Commission denied Arctic's motion for rehearing of the October 23 Order. *See* Order Denying Rehearing, 33 F.E.R.C. (CCH) ¶ 61,392 (December 19, 1985) (S.A. at 226) (the "December 19 Order").

Arctic then petitioned this court for review of the December 19 Order. That petition comprises No. 86-1115. The TAPS owners, as intervenors, moved to dismiss the petition on the grounds that Arctic was not aggrieved by the settlement, and that Arctic therefore lacked standing under the Hobbs Act, 28 U.S.C. § 2344 (1982), to seek review of the Commission's action. Concluding that Arctic's "contentions present the requisite injury to make petitioner an aggrieved party," a motions panel of this court denied intervenors' motion to dismiss, *see* Order Denying Motion to Dismiss in No. 86-1115 (D.C.Cir. July 14, 1986) (Edwards and Bork, JJ.).

Meanwhile, as the settlement proceedings were pending on remand to the ALJs, the two remaining owners agreed to join in the settlement agreement. Accordingly, the State of Alaska and the Department of Justice proposed that the two owners be formally added to the Six-Carrier Agreement. Arctic strenuously objected to the amended settlement. However, inasmuch as the ALJs viewed the agreement as identical in all material respects to the Six-Carrier Settlement, they promptly certified the amended settlement agreement to the Commission. *See* Presiding Judges' Certification of Settlement Proposal to the Commission, 35 F.E.R.C. (CCH) ¶ 63,018 (April 15, 1986) (S.A. at 232).

Pursuant to its settlement rules, the Commission in June 1986 severed Arctic (which by that time was the sole non-consenting party) from the proceeding and approved the proposed settlement as uncontested under

FERC Rule 602(g).⁷ See Order Approving Settlement, Granting Application, Affirming Initial Decision, and Terminating Dockets, 35 F.E.R.C. (CCH) ¶ 61,425 (June 27, 1986) (S.A. at 239) (hereinafter the June 27 Order).⁸ This action was taken in reliance on this court's decision in *United Municipal Distributors Group v. FERC*, 732 F.2d 202 (D.C.Cir.1984), a case that looms large in both sides' arguments before us. There, briefly stated, the court approved FERC's severance of a protestant-ratepayer from a proposed settlement where the ratepayer was afforded a further procedural remedy (consistent with the statute and the Commission's rules) to challenge the rates it was being charged. Relying upon that decision, FERC discerned no present aggrievement⁹ on Arctic's part by virtue of the settlement.

Finally, the Commission terminated all dockets in the TAPS proceeding. But in so doing, FERC made several things abundantly clear: that the settlement was not being imposed on Arctic and that Arctic therefore retained the right to challenge any future rates; that FERC's approval

⁷ Rule 602(g) provides in pertinent part:

(3) An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

18 C.F.R. § 385.602(g)(3).

⁸ In its June 27 Order, the Commission also approved the application of Sohio and Amerada Hess to be added to the pooling arrangement. See Motion of Amerada Hess Pipeline Corporation and Sohio Pipe Line Company (March 12, 1986) (J.A. at 1103).

⁹ Arctic makes much out of its assertion that FERC, contrary to principles of standing, required Arctic to be "particularly aggrieved"—meaning highly or extraordinarily aggrieved—in order to challenge the settlement. We believe the more natural reading of the Commission's language is that Arctic must be *individually* aggrieved. This usage of the word "particular" is of course common; such a reading eliminates any potential problem with the Commission's treatment of Arctic within its own standing requirements.

of the settlement did not in any manner determine that the rates established under it are (or will be) just and reasonable; that the settlement would be of no precedential value in future rate challenges; and that whatever material in the record may be relevant would be fully available to Arctic in any future proceedings.

Following the Commission's June 27 order, Arctic timely petitioned this court for review, and that case, No. 86-1427, consolidated with No. 86-1115, present the issues now before us.

II

The thrust of Arctic's challenge is that the Commission acted improperly in approving the proposed settlement in the face of its, Arctic's, vigorous opposition. In Arctic's view, the Commission was duty bound under the Interstate Commerce Act to see the 1977 rate proceeding to the terminus of determining whether the challenged rates were "just and reasonable." Arctic maintains that all parties to the proceeding, not to mention the Supreme Court, *see Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 98 S.Ct. 2053, 56 L.Ed.2d 591 (1978), contemplated that the mammoth administrative litigation would culminate in the establishment of just and reasonable rates. Discounting the role of settlements in the administrative process, Arctic emphasizes instead the agency's duty to assure lawful rates. Petitioner discerns this overriding obligation in the ICC's (now FERC's) general statutory mandate to assure that rates charged are just and reasonable, and in case law suggesting that once the agency has substantially completed an investigation, it is obliged to see the matter through to completion. *See Minneapolis Gas Co. v. FPC*, 294 F.2d 212 (D.C.Cir.1961) (a rate case under the Natural Gas Act); *see also City of Chicago v. United States*, 396 U.S. 162, 90 S.Ct. 309, 24 L.Ed.2d 340 (1969) (holding that an agency decision to terminate an investigation into termination or changes of rail service requires a full statement of conclusions under 49 U.S.C. § 14(1),

when that termination is akin to a decision on the merits); *North Carolina Utilities Comm'n v. FERC*, 653 F.2d 655, 665-66 (D.C.Cir.1981) (interpreting *City of Chicago*).

In addition, Arctic maintains that the Commission approved the settlement in violation of applicable settlement rules, see 18 C.F.R. § 385.602(h) (Rule 602(h)), and this court's opinion in *United Municipal Distributors Group v. FERC*, *supra*, 732 F.2d 202. As Arctic sees it, the Commission could not approve the settlement as uncontested when, unlike the party in *United*, Arctic was contesting the entirety of the settlement and not seeking to benefit from the agreement at all. According to Arctic, the Commission was obliged under these circumstances to carry on with the proceeding and adjudicate the issues raised by its objections.

III

We understand fully Arctic's frustration with the labyrinthine regulatory process in which it has participated.¹⁰ We also acknowledge the force of some of its arguments. But, upon analysis, we have been unable to discern any insurmountable impediment to the Commission's actions in this case. What is more, substantial

¹⁰ Intervenor's strenuously urge that Arctic has no standing to challenge the settlement because, in their view, Arctic has suffered no present aggrievement. We disagree. Like our colleagues who resolved the motion to dismiss, we conclude that the allegations of present injury on the part of Arctic suffice to satisfy the Hobbs Act jurisdictional (and the separate constitutional) requirements of injury in fact necessary to accord a party standing. In particular, Arctic persuasively contends that excessive present and future tariffs adversely affect both the wellhead value of its oil, and its lease bonus and royalty interests. Although Intervenor's challenge the "extent" of this injury, emphasizing the recent decline in world oil prices, they have failed to persuade us that our colleagues erred in discerning a sufficient present injury to satisfy jurisdictional prerequisites. See Order Denying Motion to Dismiss in No. 86-1115 (D.C.Cir. July 14, 1986) (Edwards and Bork, JJ.).

public-interest considerations undergird FERC's approval of the settlement of these extraordinarily complex and burdensome proceedings.

At the outset of our analysis, we pause to state the obvious: this dispute is entirely about a FERC-approved settlement. Of critical importance to this case, therefore, are the Commission's rules governing settlements.¹¹ Those rules are, unhelpfully for Arctic, quite broadly worded. Of particular breadth is the operative provision before us, namely Rule 602(h)(1)(ii)(B). That provision states in rather sweeping terms that when confronted with a contesting party to a settlement, the agency may take such "action which the Commission determines to be appropriate." Rule 602(h)(1)(ii)(B). The breadth of discretion trumpeted by that provision is manifest. And thus it was that the rule was construed in *United* to permit the Commission to sever a contesting party from the proceedings and to treat the matter as uncontested, so long as a forum was provided to resolve the dissenter's challenge. Thus, both the wording of the rule and its construction by this court are quite generous and flexible.

Arctic's retort is simple and straightforward: it is inappropriate and indeed unlawful for FERC not to assure just and reasonable rates.¹² This duty is all the more

¹¹ Arctic has not questioned the validity of the Commission's settlement rules under the statute. Rather, Arctic maintains that the rules cannot be applied so as to gut what it views as FERC's statutory mandate.

¹² In particular, Arctic contends that this court's decision in *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486 (D.C.Cir. 1984), requires the Commission to establish just and reasonable rates. Our holding today is in no wise inconsistent with *Farmers Union*. For that case held that once the Commission endeavors to set rates and adopts a methodology for setting those rates, the "just and reasonable" standard of the statute mandates that the Commission consider broad statutory purposes, alternatives to its methodology, and the like; the Commission may not set rates, and then choose not to substantially justify its choice as consistent with the statute's requirements. Here, the Commission has as-

acute, Arctic contends, when so much water has flowed over the litigation dam. Although this argument is hardly without force, we are nonetheless unable to discern in either the statute's language or its structure an absolute command in the form Arctic would have it.

The Commission did, after all, consistently treat this proceeding as a hearing and investigation under sections 15(7) and 15(1) of the Act.¹³ Those provisions confer broad discretion upon the Commission to structure its proceedings as it sees fit. For example, the Commission enjoys unreviewable discretion to determine whether to initiate section 15 investigations at all, *see Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 99 S.Ct. 2388, 60 L.Ed.2d 1017 (1979), and whether to suspend challenged rates, *see Aberdeen & Rockfish R.R. Co. v. SCRAP*, 422 U.S. 289, 311, 95 S.Ct. 2336, 45 L.Ed.2d 191 (1975); *Arrow Transp. Co. v. Southern Ry. Co.*, 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963).¹⁴ More-

surely *not* set any rates, nor has it determined on the merits that any rates are "just and reasonable" within the meaning of the ICA. Thus, *Farmers Union* is unavailing to Arctic.

¹³ Arctic's position that the proceedings, from their inception, were conducted under section 13 of the ICA is belied by the Commission's initial orders in 1977. For example, in *Trans Alaska Pipeline System*, 355 I.C.C. 80 (1977) (S.A. at 1), the order initiating the investigation and suspending the initial rates, the ICC states, "[t]hese [parties] seek to invoke our power under section 15(7) of the Interstate Commerce Act. . . ." Later, the ICC ordered "[t]hat an investigation be . . . instituted . . . pursuant to section 15(1) and section 15(7). . . ." 355 I.C.C. 80, 87 (1977) (S.A. at 1, 8). For further indications that the proceedings were conducted pursuant to section 15, see Report and Order on Pre-Hearing Conference, Investigation and Suspension Docket No. 9164, *et al.* (August 16, 1977) (S.A. at 16), and Initial Decision Phase I Issues, 10 F.E.R.C. (CCH) ¶ 63,026 (February 1, 1980) (S.A. at 33). Arctic has advanced no reason to persuade us that section 13 was ever involved in this case.

¹⁴ Arctic concedes that the decisions whether to begin an investigation and whether to suspend rates are entirely discretionary.

[Continued]

over, decisions under the ICA not to pursue an investigation once begun lie squarely within the agency's discretion, even if the initial investigation reveals that some rates, though not all, are illegal. *See generally United States v. Louisiana*, 290 U.S. 70, 54 S.Ct. 28, 78 L.Ed. 181 (1933) (refusing to invalidate agency decision not to prescribe rates, even though some individual rates were unjust and unreasonable); *see also United States v. SCRAP*, 412 U.S. 669, 692 n. 16, 93 S.Ct. 2405, 2418 n. 16, 37 L.Ed.2d 254 (1973) (even after preliminary investigation of rate schedules and finding that they contain individually unreasonable rates, refusal to suspend rates as generally unlawful not a reviewable decision on the merits). What is more, the Supreme Court has suggested, albeit in *dicta*, that a party dissatisfied with a decision to terminate an ongoing investigation is without recourse to the courts. *See National R.R. Passenger Corp. v. National*

¹⁴ [Continued]

But it contends that once an investigation has begun, the Commission is bound to prescribe just and reasonable rates. Its primary statutory support is the language of section 15(7), which states that "pending such hearing and the decision thereon the Commission . . . may . . . suspend" and "upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund. . . ." 49 U.S.C. § 15(7). Arctic argues that in light of this language, once the Commission has entered on an investigation, it must see it through to a decision on the merits. We cannot agree that section 15(7) so hamstring the Commission. The language relied upon describes what the Commission *may* do when it completes an investigation; it in no way *requires* an investigation to be completed. Otherwise, even settlements to which all concerned consent would be proscribed by the statute. Moreover, the language of section 14(1) rebuts the view that every investigation must end with a decision on the merits, for it prescribes findings of fact only if damages are awarded; in other circumstances, the Commission need only state its conclusions in writing. *See* 49 U.S.C. § 14(1). Moreover, *City of Chicago*, properly read, required a more extensive explanation under section 14(1) only in limited circumstances, namely where the termination of the investigation was akin to prescribing rates. Here, the Commission has explicitly disavowed any intention to prescribe rates.

Assoc. of R.R. Passengers, 414 U.S. 453, 462 n. 9, 94 S.Ct. 690, 695 n. 9, 38 L.Ed.2d 646 (1974).¹⁵ This congressionally granted, judicially confirmed discretion, coupled with the general policy favoring settlement of administrative proceedings, see *United, supra*, 732 F.2d at 209; *Pennsylvania Gas & Water Co. v. FPC*, 463 F.2d 1242 (D.C.Cir.1972), lead us to the conclusion that neither the statute nor the agency's corpus of rules requires the Commission under any and all circumstances to prescribe just and reasonable rates whenever a party requests that it do so, even after administrative proceedings have been underway for some considerable time.

In the absence of any absolutist and rigid statutory requirement, Arctic falls back to the position that, under the particular circumstances here, the Commission was duty bound to see the case through to the end. In this regard, Arctic relies on *Minneapolis Gas Co. v. FPC, supra*, 294 F.2d 212, for support. *Minneapolis Gas*, however, is a far cry from the unique situation before us. For one thing, that case did not involve a settlement. Moreover, all that remained for the agency to do before issuing its final decision was to approve or disapprove the ALJ's initial decision. The court held, under those circumstances, that once the record is complete, and the final decision is all that remains before the entire proceeding is concluded, the agency cannot at that late hour choose to terminate its investigation and successfully invoke its broad grant of discretion to shield its action.¹⁶

¹⁵ Arctic correctly points out that this case may be read to apply only to an agency decision to terminate an investigation it realizes it ought never to have begun. See Reply Brief at 24 n.58. But even on its face, this statement from *National R.R. Passenger Corp.* is consistent with *City of Chicago*, which held that an agency decision to discontinue an investigation, if it has the effect of being a decision on the merits, must be supported by a section 14 statement. This court, in *North Carolina Utilities Comm'n, supra*, 653 F.2d at 666, similarly interpreted *City of Chicago*.

¹⁶ We further note that the FPC's termination of the investigation in *Minneapolis Gas* had the explicit effect of approving the

Here, the case was regrettably far from complete. True, the administrative litigation was far along; indeed, many years marked by vigorous litigation had passed. Nonetheless, the agency was not even considering, much less near the point of decision on, the reasonableness of the TSM and the rates established under it.¹⁷ There was a long way to go, as evidenced by the State of Alaska's desire to conclude these nigh interminable proceedings through the avenue of settlement. And the settlement itself, sanctioned by the broad sweep of the Commission's rules, sets this case quite apart from *Minneapolis Gas*.

There is another factor as well. The reasonableness of rates to be charged into the 1990's (and beyond) can hardly be evaluated exclusively on the basis of a factual record that draws to a close in 1982. Indeed, Arctic undercuts its own position in this respect—that the case is now ready for final decision—by arguing that the record is now and will perforce remain “stale” (save as to the Phase II record regarding costs of TAPS construction). These factors, buttressed by the fact that *Minneapolis Gas* reserved judgment on the type of line-drawing question at issue here, *see* 294 F.2d at 215, amply warrant the conclusion that the Commission had not reached the point of no return contemplated in that case.¹⁸ Although

rates as just and reasonable. *See* 294 F.2d at 214. Here, of course, FERC has explicitly stated just the opposite—that its settlement approval in no way establishes the justness or reasonableness of any rates.

¹⁷ Although at the outset of the investigation in 1977, the Commission did refer to any rate schedules that were issued while the investigation was pending, *see* 355 I.C.C. 80, 87 (1977) (S.A. at 8), the Commission's nine-year proceedings did not (and could not) focus upon or have anything to do with the TSM and the rates it established.

¹⁸ This case would be much closer to *Minneapolis Gas* if after nine years the Commission simply ended its investigation and allowed the 1977 rates to stand. Here, however, the TSM and the

we readily agree that it seems odd, at least at first glance, that the Commission would elect to conclude a nine-year long proceeding without reaching the merits, we cannot fail to appreciate the unique nature of the protracted and extraordinarily complex TAPS investigation that prompted the principal parties in the proceeding to settle the case. The very uniqueness of the proceeding and the subsequent settlement renders the Commission's action more readily understandable and defensible.

Nor does our decision in *United* rescue Arctic's position. There, as we alluded to above, a current gas ratepayer wanted to embrace a settlement agreement in a rate case while slicing out one issue (a tax treatment question) which the other parties had subsumed within the terms of the global settlement. To the dissenting ratepayer's dismay, the Commission required it to litigate its entire case, thereby thwarting its effort to have its cake and eat it too. In that setting, this court upheld the Commission's determination to make the challenger live with the consequences of an all-or-nothing choice and to litigate its rate challenge in its entirety.

Here, Arctic is, for starters, not even a current rate payer. Its interest is therefore considerably less immediate than that of the ratepayer in *United*. But in addition, the Commission has made it clear that Arctic's challenges, including its assault on the TSM, are fully preserved and can be advanced in an appropriate proceeding under section 15 or section 13. The efficacy of this future remedy is reinforced by the fact that the Commission has expressly stated that its June 27 Order is not preclusive; that whatever evidence in the record is relevant may be used in the future; and that Arctic is in no way bound by the settlement. See June 27 Order, 35 F.E.R.C. (CCH)

rates established pursuant to it are unrelated to the rates initially filed in 1977; moreover, the TSM is of course the product of a settlement, which was not the setting of *Minneapolis Gas*.

¶ 61,425 (S.A. at 239) ; *supra* text at 10. The Commission has thus safeguarded Arctic's future interest, while saying that it will not be permitted to torpedo a fair and reasonable settlement as to all who have the most direct and immediate interest in these long-lived proceedings.

In regarding the remedy provided to Arctic *in the future* as "appropriate" within the meaning of Rule 602(h) (1) (ii) (B),¹⁹ we should make it clear that we do not unduly discount the fact that the settlement currently affects Arctic's interests. *See supra* note 10. We hold only that it is appropriate for the Commission, under the specific circumstances at hand, to serve those interests by not forcing the settlement upon Arctic and by preserving possible future challenges for a riper moment.²⁰

¹⁹ Rule 602(h), concerning contested settlements, provides in relevant part:

(1) (i) If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.

(ii) If the Commission finds that the record lacks substantial evidence or that the contested issues cannot be severed from the offer of settlement, the Commission will:

(A) Establish procedures for the purpose of receiving additional evidence before a presiding officer upon which a decision on the contested issues may reasonably be based; or

(B) Take other action which the Commission determines to be appropriate.

18 C.F.R. § 385.602(h) (1).

Arctic cannot challenge the appropriateness of severing contesting parties to a settlement; *United* disposed of that argument. Thus, Arctic must contest the "action" the Commission then took, namely relegating Arctic to a future proceeding, as inappropriate within the meaning of subsection (B).

²⁰ Our conclusion in this respect is entirely consistent with *United*. That case suggested that *some* remedy is to be afforded a contesting party. Under its settlement rules, the Commission has

Thus, while Arctic is understandably unenamored of the prospect of beginning anew,²¹ the harsh reality of long and protracted regulatory proceedings appears at times endemic to the regulatory structure that Congress has seen fit to fashion. In short, neither the statute nor the Commission's rules prevent FERC from embarking upon the course it has chosen, and thereby satisfying the manifold interests of virtually all the parties to this mammoth proceeding.

We thus are constrained to conclude that Arctic can properly be left out in the cold for the moment. But we are comforted in this unhappy conclusion by the specific reasons advanced by the Commission in approving the settlement. The Commission discerned a number of public-interest advantages flowing from the arrangement. Quite apart from bringing a merciful conclusion to the protracted litigation, the settlement's salutary features include the fact that rates have come down substantially—and continue to do so—under the TSM; that the State of Alaska has received substantial refunds redounding to the benefit of its citizens; and that, in the Commis-

wide latitude in determining the appropriate remedy. In view of the indirect—though assuredly real—impact of the settlement on Arctic, we are unprepared to say that the remedy of preserving future challenges lies outside the bounds of the Commission's discretion.

²¹ To be sure, it seems curious that a party who participated fully in the litigation for nine years could at the end be told that its interest is not immediate enough to challenge the settlement. But that view overlooks the difference between the Commission's liberal policies regarding participation in proceedings and its interest in ending seemingly interminable litigation, which virtually all parties are seeking to conclude. As long as the Commission provides Arctic with a meaningful remedy contemplated by the statute, FERC could choose within its sound discretion to approve the settlement (bearing in mind that the standards of Rule 602(g) must be met), especially in light of Arctic's currently less direct interest in rates than it may well have at some later time.

sion's view, competition will be increased in the settlement's wake. Finally, it is of no little moment that the entities charged with protecting the public interest, including the State of Alaska and the Department of Justice, have heartily approved of the settlement. And, even as to Arctic, the impact of the settlement is less severe and direct than would be the impact visited upon a dissenting ratepayer (such as the ratepayer in the *United* litigation) here and now.

IV

In sum, the Commission acted within its lawful authority and sound discretion in closing a long and wearisome chapter in the saga of TAPS rate regulation. Should Arctic see fit to do so, it may return to the Commission when the impact of TAPS rates upon it is more concrete and substantial. Until that time, we can see no reason in law that the Commission should be precluded from taking "appropriate" and sensible action in approving a settlement as in the public interest, while ensuring that Arctic can avail itself of its future remedies when its interest is more fully developed.²²

Denied.

²² We have considered petitioner's various other contentions and find them sufficiently lacking in merit to warrant discussion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1115

ARCTIC SLOPE REGIONAL CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents

STATE OF ALASKA, *et al.*,
Intervenors

[Filed July 14, 1986]

Before: EDWARDS and BORK, *Circuit Judges*

ORDER

Upon consideration of intervenors' Motion to Dismiss, the opposition and reply thereto, petitioner's Motion to Defer Further Proceedings, and the opposition and reply thereto, it is

ORDERED by the court that the motion to dismiss be denied. Petitioner claims that the order of the Federal Energy Regulatory Commission deprived petitioner of the right to pursue certain challenges in the proceedings

that are the subject of the order being petitioned from. Petitioner's contentions present the requisite injury to make petitioner an aggrieved party. See *National Treasury Employees Union v. United States Merit Systems Protection Board*, 743 F.2d 895, 910 (D.C. Cir. 1984); *United Municipal Distributors Group v. FERC*, 732 F.2d 202, 206 n.3 (D.C. Cir. 1984). It is

FURTHER ORDERED by the court that the motion to defer further proceedings be dismissed as moot. Petitioner sought to defer further proceedings pending a ruling by the Federal Energy Regulatory Commission. That ruling has already been issued.

Per Curiam

APPENDIX C

[¶ 61-425]

Docket Nos. OR78-1-041, OR78-1-042 and OR78-1-043
TRANS-ALASKA PIPELINE SYSTEM
Docket No. IS84-13-000

SOHIO PIPE LINE COMPANY

Order Approving Settlement, Granting Application,
Affirming Initial Decision, and
Terminating Dockets

(Issued June 27, 1986)

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

[Note: Initial Decision of the Presiding Administrative Law Judges, issued April 23, 1986, appears at 35 FERC ¶ 63,027.]

On October 23, 1985, the Commission approved a Settlement Agreement between the State of Alaska (Alaska) and six of the eight TAPS owners—ARCO Pipe Line Company, BP Pipelines Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, and Union Alaska Pipeline Company (now Unocal Pipeline Company).¹ As to the nonsettling parties, the Commission remanded the proceeding to the administrative law judges (ALJs) “to enable the nonsettling parties to discuss at a hearing the settlement issues they have raised only as those issues apply to them.”²

¹ 33 FERC ¶ 61,064, *reh'g denied*, 33 FERC ¶ 61,392 (1985).

² 33 FERC ¶ 61,064, at p. 61,140 (1985).

The Commission also directed the ALJs to transmit an initial decision to the Commission within six months of the order of October 23, 1985.³ On December 19, 1985, the Commission denied the Arctic Slope Regional Corporation's (Arctic) request for rehearing.⁴ The Commission reiterated the above-quoted language and further stated that "Arctic is afforded an opportunity to raise its issues at a hearing."⁵ In December 1985, the ALJs held a hearing and received evidence filed by Arctic and by the Alaska Public Interest Research Group (AkPIRG). Thereafter, the ALJs received initial briefs from the Sohio Pipe Line Company (Sohio), Amerada Hess Pipeline Corporation (Amerada Hess), AkPIRG, Arctic, and Alaska and a reply brief from Sohio. On April 23, 1986, the ALJs issued their initial decision as directed by the Commission.⁶ The ALJs concluded that "the Commission does not have the authority, under the facts of the remanded proceeding, to impose the settlement on the objecting parties."⁷ On May 23, 1986, Arctic filed a brief on exceptions to the initial decision. On June 6, 1986, Alaska, Sohio, and the six original settling owners filed briefs opposing Arctic's brief on exceptions. On June 13, 1986, Amerada Hess filed a brief opposing Arctic's exceptions.

The six original settling TAPS owners also moved to intervene on June 6, 1986, for the limited purpose of replying to Arctic's brief on exceptions. The six original settling owners filed their motion on the ground that they were not parties to the settlement remand proceeding. On June 16, 1986, Arctic filed an answer in opposi-

³ *Id.* at pp. 61,140-41.

⁴ 33 FERC ¶ 61,392 (1985).

⁵ *Id.* at p. 61,757.

⁶ 35 FERC ¶ 63,027 (1986).

⁷ *Id.* at p. 65,076.

tion to the six original settling owners' motion to intervene. Because the six original settling owners are parties to the overall TAPS proceeding, we see no reason to rule on their motion to intervene or Arctic's answer in opposition. Accordingly, the reply of the six original settling owners is accepted.

Amendment to Settlement Agreement

On March 12, 1986, Alaska filed with the ALJs an amendment to the Settlement Agreement (Amended Settlement Agreement) pursuant to which Amerada Hess and Sohio entered into and agreed to be bound as parties to the Settlement Agreement. The Commission's trial staff and the United States Department of Justice (Justice) support the Amended Settlement Agreement. Arctic opposes the Amended Settlement Agreement. On April 15, 1986 [35 FERC ¶ 63,018], the ALJs certified the Amended Settlement Agreement to the Commission.

Because the Amended Settlement Agreement is identical in all material respects to the Settlement Agreement approved by the Commission in its order of October 23, 1985, it is not necessary to again set forth the terms and provisions of the agreement.⁸

As discussed below, the Commission finds that since it is not imposing the settlement on Arctic, Arctic's interests are not affected by it. Accordingly, its opposition to the settlement is moot. Since the result of the settlement does not present any current, genuine, material issues, we may dispose of the matter before us by treating the Amended Settlement Agreement as an uncontested settlement. In its order of October 23, 1985, the Commission exhaustively discussed why approval of the Settlement

⁸ The terms are set forth at 33 FERC ¶ 61,064, pp. at 61,138-39. The Amended Settlement Agreement specifies maximum interstate tariffs for Amerada Hess and Sohio for 1986 of \$4.49 for Sadlerochit reservoir and \$4.60 for Kuparuk reservoir petroleum.

Agreement was fair and reasonable and in the public interest.⁹ Likewise, the Commission finds that the Amended Settlement Agreement is fair and reasonable and in the public interest for the reasons given in the order of October 23, 1985.

Initial Decision and Arctic's Exceptions Thereto

In their initial decision on remand, the ALJs concluded that the settlement could not be imposed on objecting parties by the Commission.¹⁰ On May 23, 1986, Arctic filed a brief on exceptions to the initial decision. Arctic agrees with the ALJs' conclusion that the settlement cannot be imposed on objecting parties, including Arctic. Despite Arctic's satisfaction with the ALJs' conclusion, it excepts to several of their statements. Arctic objects to the ALJs' statement that two of its witnesses "essentially merely echo the comments made in connection with [Arctic's] opposition to the six-carrier settlement proposal"¹¹ and to their statement that "if approved [the instant settlement] effectively would terminate the pending rate proceedings with respect to the transportation of oil by all eight carriers who own individual interests in TAPS"¹² and "will terminate these proceedings as far as the Commission is concerned."¹³ Arctic argues that the Commission may not lawfully dismiss its protest over its objection unless the Commission establishes just and reasonable rates. We discuss each of Arctic's specific contentions in turn.

Arctic argues that approval of the settlement and dismissal of its protest will in effect impose the settlement

⁹ 33 FERC at pp. 61,139-40.

¹⁰ 35 FERC ¶ 63,027, at p. 65,076.

¹¹ *Id.* at p. 65,075.

¹² *Id.*

¹³ *Id.*

on it. It claims that such action would not comport with Rule 602(g) of the Commission's Rules of Practice and Procedure which governs uncontested settlements,¹⁴ the decision of the United States Court of Appeals for the District of Columbia Circuit in *United Municipal Distributors Group v. F.E.R.C. (United)*,¹⁵ and our recent order in *Northern Natural Gas Co. (Northern)*.¹⁶ We disagree. We are not imposing the settlement on Arctic either directly or indirectly.¹⁷ Therefore, in accordance with the Commission's regulations, we may treat the settlement as uncontested. Hence, we may approve the settlement pursuant to Rule 602(g) as fair and reasonable and in the public interest.

Moreover, in our view, our action comports with the holdings in both *United* and *Northern*. In both cases, the settlement was not imposed on the objecting party. Here, also, we are *not* imposing the settlement on Arctic. Arctic is not in any way bound by the settlement. As observed by the six original settling owners in their briefs, the

¹⁴ 18 C.F.R. § 385.602(g) (1985).

¹⁵ 732 F.2d 202 (D.C. Cir. 1984).

¹⁶ 35 FERC ¶ 61,105 (1986).

¹⁷ Approval of the settlement does not in any way affect Arctic's rights. If Arctic wishes to litigate just and reasonable rates, Arctic will have the opportunity to do so in the future. This is because under the terms of the settlement, specifically Section I-4, the TAPS carriers will make annual filings of the maximum interstate tariffs. We view these filings as rate filings under the ICA, and Arctic will have the opportunity to protest these filings as it would any rate change filing under the ICA. The burden of showing that the new rate is just and reasonable will be on the TAPS carriers, pursuant to section 15(7) of the ICA which provides that in any "hearing involving a change in rate . . . the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable . . ." The carriers cannot rely on the approved settlements to establish the justness of these filed rate changes, since the settlement rates were never adjudicated to be just and reasonable.

settlement in no way limits Arctic's legal remedies. Hence, the procedure endorsed by the court in *United* of both preserving the bargain of the settling parties and also protecting the rights of non-consenting parties has been utilized. While it is true that in *United* and *Northern* the objecting parties were entitled to an immediate hearing on the merits, this was because those parties had immediate interests as customers (*United*) and a state commission (*Northern*).

It is most ironic that Arctic argues *United* as support for its position. The Commission correctly interpreted *United* as judicial approval for the approach adopted in its October 23, 1985 order. The court in *United* expressly negated the precise arguments presented by Arctic, including the novel concept of being "settlement bound," where the court stated that "where a settlement is reasonable, we think it could not be coercion to leave a party who declines to join it to his legally prescribed remedies."¹⁸ The court spoke in terms of permitting a non-settling party to preserve its objection, while allowing the settling parties to have the benefit of a settlement found by the Commission to be fair and reasonable and in the public interest. The court stated that the Supreme Court's opinion in *Mobil Oil Corp. v. F.P.C.*, (*Mobil*) 417 U.S. 283 (1974) and this Commission's regulations support that approach. The court also emphasized that *Mobil* and other precedent recognize that settlements of rate proceedings are to be encouraged, and the Commission's action in the *United* case "serves this salutary policy by preserving a settlement for all non-objecting parties and by also permitting [the objecting party] to preserve its objection."¹⁹ The court found nothing in *Mobil* to preclude the Commission from taking that action. The approach adopted in the October 23, 1985 order

¹⁸ *United* at 210 n. 12.

¹⁹ *United* at 209.

is supported clearly and categorically by the court's analysis and opinion in *United*.

The Commission has been faithful to both the letter and the spirit of the court's opinion and guidance in *United* by providing Arctic a full opportunity to preserve its objections to the settlement and pursue its legally prescribed remedies separately, while preserving the benefits of the settlement for the settling parties. Since the ALJs first certified the original settlement as to the six owners, Alaska and Justice in August 1985, the Commission has provided Arctic the procedural opportunity to establish its standing to contest the settlement, to challenge the Commission's procedures in considering the settlement and to make a record of its substantive analysis and objections to the settlement. Arctic's concerns were not and have not been unceremoniously dismissed out of hand by the Commission. Quite the contrary, the Commission has sought at each step of the TAPS settlement proceeding to ensure Arctic's full procedural due process, consistent with *United*, to pursue its legally prescribed remedies. As the Commission stated in its October 23, 1985 order:

The Commission will approve the settlement with respect to the settling parties because it is fair and reasonable and in the public interest. The settling parties have fashioned an innovative methodology which achieves their respective aims in this proceeding. The settlement is a comprehensive, long-term settlement of complex issues in a hotly contested, lengthy and expensive proceeding. Such settlements necessarily involve compromises by the parties from their litigation positions. Otherwise, settlements such as this one, which are to be encouraged and which are in the interests of this Commission, the regulated companies, their customers, other parties such as Alaska and Justice, and the public would not be possible. The Commission strongly believes the settling

parties are entitled to the benefits of their bargain and to not adopt the settlement would be contrary to the public interest.

Nonetheless, the Commission acknowledges the concerns of the nonsettling parties and shall remand the proceedings with regard to them to the administrative law judges to allow the nonsettling parties a hearing only on those issues which apply to them.²⁰

In footnote 17, to the order of October 23, 1985, the Commission reiterated its intent that the remand of the proceedings would "enable the nonsettling parties to air their objections at a hearing," and "the Commission is not at this time imposing the terms of the Settlement Agreement on any nonsettling party."²¹ Subsequently, in denying rehearing of that order, the Commission further addressed the concerns of Arctic in its order of December 19, 1985:

Additionally, Arctic presents a summary of the settlement's alleged deficiencies to bolster its request for rehearing. However, the Commission has given Arctic a forum in which to present these arguments. The order of October 23, 1985, allows Arctic to air its specific objections to the Settlement Agreement at the hearing on remand as those issues apply to it.²²

Our commitment to provide Arctic with a full opportunity to address these issues has not been without opposition. Despite the concerted efforts of some of the settling parties, we have remained steadfast in our resolve to provide Arctic that opportunity and have stayed the course on completing the remand proceedings without any deviation from our regular procedures. Shortly after

²⁰ 33 FERC at p. 61,140.

²¹ *Id.* at p. 61,141.

²² 33 FERC at p. 61,757.

the ALJs certified to the Commission the Amendment to the Original Settlement, Alaska petitioned the Commission to abandon the regular procedures which would otherwise apply to the remand proceedings and to substitute expedited briefs and reply briefs by the parties concerning the disposition of any relevant matters in lieu of an Initial Decision by the ALJs and subsequent submission of briefs on exceptions and reply briefs.²³ Alaska argued that the substituted approach was appropriate in light of the settlement amendment by the two remaining owners and was necessary because the terms of that settlement allowed any party to withdraw from the agreement if the Commission did not approve the settlement by May 31, 1986. Consequently, Alaska argued, the Commission was compelled to adopt the substitute procedure to complete final action by May 31 and thereby insure that no party would withdraw from the settlement. We set an expedited schedule for briefs commenting on Alaska's petition.²⁴ Arctic strenuously objected to Alaska's proposal and urged that the Commission to proceed with an Initial Decision. Arctic persuasively argued that there was "no good reason to grant the requested relief" and that Arctic "cannot lawfully be deprived of the benefit of the closed settlement remand record that was created principally by [Arctic] at considerable expense and effort pursuant to the Commission's October 23, 1985, order."²⁵ Almost all of the settling parties submitted comments supporting Alaska's petition which was also supported by the Commission's trial staff. Ultimately, the Commission took no action on Alaska's petition and on April 14, 1986, Alaska withdrew the petition, stating

²³ Motion of Alaska to Establish Procedures for the Expeditious Resolution of the Present Proceeding filed on March 24, 1986.

²⁴ See, Order Limiting Time to Answer Motion, issued March 27, 1986.

²⁵ Opposition of Arctic Slope Regional Corporation to Motion of Alaska, filed March 31, 1986, at 1, 2.

that the motion had "precipitated an unnecessary confrontation with [Arctic] which perceives, incorrectly, that it will lose some substantive or technical advantage from the motion."²⁶ While Alaska eventually withdrew its petition in the face of Arctic's opposition and the Commission's inaction, it is quite obvious that Alaska's substitute approach would have significantly narrowed the substantive scope of our consideration of the issues in the remand proceeding, limited the submissions of the parties accordingly, and imposed a much shortened schedule for our consideration of these matters.

Ultimately, the ALJs rendered an Initial Decision in the remand proceedings on April 23, 1986, and there has been no deviation from the subsequent briefing schedule under our regulations, despite the pleadings of the settling parties or our action and the passage of the May 31, 1986, deadline, which was imposed by the settlement. The Initial Decision concluded that the Commission does not have the authority under the facts of the remanded proceeding to impose the settlement on the objecting parties.²⁷ Arctic, in fact, has relied repeatedly on that conclusion in its pleadings.²⁸

As it sought in its opposition to Alaska's petition, Arctic has had a full opportunity to pursue all of its objections to the settlement in the context of the remand proceedings. Arctic, in a pleading filed June 16, 1986, has acknowledged that fact, as follows:

In summary, the Commission's purpose in ordering the settlement remand hearing was to:

allow . . . [Arctic] to air its specific objections to the settlement agreement at the hearing on remand as those issues apply to it.

²⁶ Notice of Withdrawal by Alaska, filed April 14, 1986, at 1.

²⁷ Text at footnote 7 above.

²⁸ See e.g., Arctic's Brief on Exceptions to Initial Decision at 6.

33 FERC (CCH) ¶ 61,392 at 61,757. Because the settlement remand hearing was the first and *only* evidentiary opportunity Arctic ever has had to address the principal defects in the settlement as those issues affect Arctic's interests, Arctic, at great cost and subject to what Arctic believed to be improper and unfair strictures of the Administrative Law Judges, took that opportunity seriously and prepared and presented detailed testimony of highly qualified expert witnesses on specific aspects of the settlement that have an immediate, continuing and highly detrimental impact on Arctic's very specific interests as a landowner and prospective shipper.²⁹

Consequently, we are confident that Arctic has had the fullest possible procedural due process in the remand proceedings. Arctic has been provided a formal hearing at which to preserve its objections and pursue its legal remedies. Arctic, as it has acknowledged, has taken full advantage of that opportunity. The efforts of Alaska to limit the substantive scope and procedural approach of the remand proceedings, opposed strenuously by Arctic, were unsuccessful. The Initial Decision before us has been the subject of full briefing on exceptions and in reply briefs by all participating parties. The Commission, as a result, has satisfied the Court's guidance in *United* by procedurally allowing Arctic to preserve its objections and pursue its legal remedies through the full remand process, which it has done. The court in *United*, however, did not conclude that the Commission had a further obligation, beyond the procedural preservation of objections and pursuit of legal remedies, to grant the specific relief sought by a non-settling party, independent of the substantive results of the procedural opportunity to provide for such preservation and pursuit. For example, Arctic, citing the *United* opinion cannot both accept the

²⁹ Answer of Arctic in opposition to motion of six original settling owners to intervene, filed June 16, 1986, at 8, 9.

conclusion resulting from the remand proceedings that it is not bound by the settlement, and demand that the Commission either reject the settlement or, in the alternative, modify the settlement with five specific modifications, which substantially alter the settlement, as a condition to its withdrawal of opposition to the settlement.³⁰ Our substantive conclusions of fact and law must and will reflect the complete record before us, including the remand proceedings, pursuant to *United*. As a result, our approach will have afforded Arctic every procedural opportunity under our rules to proceed with such preservation and pursuit in seeking its requested substantive result in full satisfaction of *United*. It is in that regard that Arctic has misconstrued our action under *United* in the *Northern* case.

We were persuaded on rehearing in *Northern* by the arguments of the Iowa State Commerce Commission (ISCC) that it was bound by the settlement remedy, because the Commission in approving the offer of settlement, including specific refunds, without modification had precluded itself, in fact, from ordering the further refunds sought by ISCC. ISCC argued that the Commission therefore could not consider any other result in the remand proceedings involving only ISCC and order further refunds. In effect, ISCC argued it was bound by the settlement, because the Commission under applicable precedent could not order *any* further refunds ISCC sought upon conclusion of the original remand proceedings. Furthermore, the settlement in *Northern*, if approved, would have resolved the issue of *past* gas purchasing practices by the pipeline challenged by ISCC and required *current* refunds and *immediate* action by the pipeline, which would be of *clear* and *present* concern to ISCC and Iowa consumers. Consequently, we were persuaded that approval of the settlement there with a sep-

³⁰ Arctic's Brief on Exceptions filed May 23, 1986, at 13, 14.

arate remand for ISCC would foreclose as a matter of law the further consideration of the gas purchasing practices issue and the additional refunds. Our conclusions and decision in *Northern* turned solely on the issue of whether approval of the settlement would prevent the further immediate refunds sought now by ISCC. Arctic quite simply does not stand in the shoes of ISCC substantively or procedurally, and as a result, our decision in *Northern* does not apply to the instant case. Furthermore, as we stated in our October 23 order, "the Commission strongly believes the settling parties are entitled to the benefits of their bargain and to not adopt the settlement would be contrary to the public interest."³¹ Failure to adopt the settlement would also be completely contrary to the approach in *United*.

Arctic claims that dismissal of its protest will violate the Interstate Commerce Act (the Act) which requires that the Commission issue a decision on the merits. The Commission agrees with Arctic that section 14(1) of the Act requires it "to make a report in writing . . . which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises."³² We do not agree that the report must be on the merits. While the Supreme Court stated that the report "deals with the merits,"³³ the appellants before the Court were aggrieved.³⁴ As we shall discuss below, Arctic is not at the present time aggrieved by the settlement. Under these circumstances, we believe that this order complies with the requirements of section 14(1) of the Act.

³¹ 33 FERC at p. 61,140.

³² 49 U.S.C. § 14(1) (1976).

³³ *City of Chicago v. United States*, 396 U.S. 162, 166 (1969).

³⁴ *Id.* at 163.

Arctic further cites our recent order in *Southern Pacific Pipe Lines, Inc.*³⁵ for the proposition that we may not approve the settlement as uncontested and dismiss its protest. In that order, we stated that "section 15(7) of the Interstate Commerce Act requires that changed rates be just and reasonable" and that we can approve contested settlements that "establish just and reasonable rates."³⁶ Here, we are dealing, as aforesaid, with an uncontested settlement, not applicable to Arctic, which involves initial rates filed in 1977. Such uncontested settlements may be approved if they are fair and reasonable and in the public interest.³⁷ Both on October 23, 1985 and in this order, we find this settlement to be fair and reasonable and in the public interest.

Arctic also argues that its testimony demonstrates the disastrous financial consequences it will suffer if the settlement is approved. We shall address Arctic's contentions regarding its pecuniary interests in TAPS rates in the next section of this order.

In Arctic's June 16, 1986, answer in opposition to the motion of the six original settling owners to intervene, Arctic states that it has spent over \$2 million establishing an evidentiary record in this proceeding. Arctic complains that dismissal of its protest would force it to start from scratch in some future proceeding for which the present presiding ALJs might not be available. The evidentiary record made in this proceeding will be available to Arctic in the future. To the extent that the present record is material and relevant to the issues raised in any future proceeding, Arctic and any other participant in the present proceeding may request incorporation of the present evidentiary record into the record of the fu-

³⁵ 35 FERC ¶ 61,242 (1986).

³⁶ *Id.* Slip Op. at 3.

³⁷ 18 C.F.R. § 385.602(g)(3) (1985).

ture proceeding. Moreover, if at all possible, we will try to have one or both of the present presiding ALJs assigned to any future proceeding.

To conclude, we affirm the conclusion of the ALJs that the settlement may not be imposed on any objecting party, including Arctic, and affirm the initial decision.³⁸

Arctic is Not Aggrieved by the Settlement

It is uncontested that Arctic is a party to this proceeding. However, no party may automatically create a genuine, material issue in a settlement merely by its opposition to the settlement. As the Commission has stated:

If a party's interests are not *immediately and irreparably affected* by approval of a settlement . . . , that party's opposition to a settlement does not create a genuine, material issue.³⁹ (Emphasis added).

Arctic must be particularly "aggrieved" by the settlement in order to legitimately challenge the settlement on the merits. The courts have fashioned a test to determine judicial standing which we think is appropriate in this context as well. The test is whether a party "has sustained an injury *in fact* to an interest arguably within the zone of interests protected or regulated by the [Interstate Commerce Act]." ⁴⁰ (Emphasis added).

Whether Arctic is aggrieved must be determined on the basis of the specific facts of this proceeding. As the United States Court of Appeals for the District of Columbia Circuit has stated, this requires:

³⁸ Sohio observes in its reply that the initial decision has given Arctic what it sought: no imposition of the settlement on Arctic.

³⁹ *El Paso Natural Gas Co.*, 25 FERC ¶ 61,292, at p. 61,673 (1983).

⁴⁰ *ANR Pipeline Co. v. F.E.R.C.*, 771 F.2d 507, 515 (D.C. Cir. 1985); *National Treasury Employees Union v. United States Merit Systems Protection Board*, 743 F.2d 895, 910 (D.C. Cir. 1984).

not only present and immediate harm, but also a "looming unavoidable threat" of harm. In other words, it is sufficient . . . if a party has an "immediate prospect of future injury."⁴¹

Such aggrievement "must be present and immediate."⁴² Therefore, Arctic's injury must be real, not speculative, and "must be 'immediately pressing.'"⁴³

At present, Arctic neither ships oil through TAPS nor does it have a royalty interest in any oil being shipped via TAPS. It has no direct present interest in TAPS' rates. Arctic informs us that it has interests in probable and possible [oil] reserves on the Alaskan North Slope (ANS) and the oil in which it has a royalty interest will be shipped over TAPS soon. At best, the record indicates this shipment *may* occur in the early to mid-1990's.⁴⁴ This contingent, potential future interest is not so present and immediate to justify allowing Arctic to raise this proceeding to the level of a contested settlement. The prospect of any injury is not only not immediate but may not occur, if it occurs at all, until the 1990's.⁴⁵

Arctic also claims that an excessive TAPS rate will reduce the value of its land and its crude oil resources by reducing the wellhead value of ANS oil. Arctic ar-

⁴¹ *ANR Pipeline Co. v. F.E.R.C.*, 771 F.2d 507, 515-16 (D.C. Cir. 1985) (citation omitted).

⁴² *Cincinnati Gas & Electric Co. v. F.E.R.C.*, 246 F.2d 688, 694 (D.C. Cir. 1957).

⁴³ *Id.*, quoting *Eccles v. Peoples Bank*, 333 U.S. 426, 432 (1948).

⁴⁴ Prepared Direct Testimony of Thomas E. Kelly on behalf of Arctic at 9.

⁴⁵ As Alaska and the six original settling owners observe in their replies, the recent plunge in the world price of oil makes it questionable whether Arctic's reserves will ever be developed. See *Oil and Gas Journal* 43, 46, 48 (March 31, 1986).

gues that this will reduce its lease revenues from potential bidders by reducing bids and bonus payments it will receive in lease negotiations. While we recognize that potential bids and bonus payments are of legitimate concern to Arctic, we observe that potential offers of any bids and bonus payments are not linked to the TAPS settlement rates, since they do not apply to Arctic. Logically, potential offers must be concerned with TAPS' rates when and if the ANS oil starts flowing at some future date. As the record indicates, the earliest projection for potential shipment of any of this oil is in the 1990's. Hence, we cannot agree that our approval of this particular settlement and the setting of rates thereunder will have any particular linkage to Arctic's future bids and bonus payments, if any, because the settlement doesn't set rates for Arctic's oil. The settlement only establishes a maximum tariff which contains elements such as rate of return, capital structure, and a \$0.35 per barrel charge starting in 1990. As in any rate case, such items are subject to change. In addition, as observed by the six original settling carriers in their reply, TAPS' rates in the 1990's will be based on cost-of-service data and throughput estimates for the rate year in question. Current cost data and hypothetical throughput estimates are irrelevant to rates in the 1990's. In light of the foregoing, we conclude that the settlement will not cause any real harm to Arctic's potential bids and bonus payments either now or in the future.⁴⁶

We conclude that Arctic has not shown any present or immediate harm or demonstrated any "immediate prospect of future injury" to its interests.⁴⁷ It will not have

⁴⁶ For the same reasons, bidders' decisions to bid at all and lessees' decisions to develop will not be affected by the settlement.

⁴⁷ Arctic asserts that the ALJs in their initial decision acknowledged that:

The TAPS tariffs affect the economics of the leases that [Arctic] can negotiate and they determine whether some marginal

an interest in any oil shipped through TAPS until the 1990's, if then.⁴⁸ Moreover, as we discussed above, we fail to see how the settlement will have any impact on Arctic's bids and bonus payments either at present or in the future.

In response to numerous allegations, we categorically state that our approval of this settlement is not a precedent as to future TAPS' rates. As a non-settling party, Arctic will simply not be bound by the settlement. By approving the settlement we are making no determinations adverse, prejudicial, or precedential to Arctic's interests. Moreover, the settlement merely sets maximum tariffs. It does not preclude lower future tariffs. Indeed, we think the knowledge that there is a cap on TAPS' rates may well aid the developers of ANS oil in their decision-making processes and should, as both Alaska and Justice believe, encourage the development of ANS oil.⁴⁹

In summary, we conclude that Arctic has not, at this time, raised a genuine, material issue sufficient to constitute a contested settlement.⁵⁰ There are no persuasive arguments in Arctic's brief which compel a different re-

properties can be leased at all or will be developed. (35 FERC at 65,075).

We read the ALJ's initial decision as merely stating, without adopting, the above testimony. In any event, for the reasons given in the text, we have concluded that the TAPS settlement tariffs do not affect the negotiation of Arctic's leases or the development of its properties. Despite Arctic's allegation that its witnesses presented evidence of present economic harm, for the reasons given above, we reject Arctic's analysis.

⁴⁸ See n. 45, *supra*.

⁴⁹ 33 FERC at p. 61,139.

⁵⁰ Accordingly, we also see no reason to modify the settlement as Arctic requested both in its brief on exceptions and initial comments on the settlement.

sult.⁵¹ To determine, as Arctic would have us do, that the Commission may not terminate a rate proceeding merely because a proceeding has begun, is erroneous. To conclude otherwise would require the Commission to routinely proceed in cases where there is no actual case or controversy. Congress could not have intended such a result. The Commission may take any appropriate action in any proceeding, at any time, including termination, as long as the parties have had a fair opportunity to present arguments and relevant evidence. Arctic has been given that opportunity. The Commission has no further obligation other than to state the rationale for its decision, as it does in this order.

Consequently, we approve the settlement, and terminate the proceeding without prejudice.⁵² As recommended by the ALJs in their initial decision, we do not impose the settlement on Arctic nor is Arctic bound by our

⁵¹ Arctic observes that Section 13 of the Interstate Commerce Act forbids the dismissing of complaints "because of the want of direct damage," 49 U.S.C. § 13(2) (1976). *ICC v. Baird*, 194 U.S. 25, 39 (1903). That section merely recognizes the possibility of indirect damage. However, it in no way bars a dismissal where, as here, there is no immediate damage.

⁵² AkPIRG did not contest the instant settlement. It did oppose the settlement between Alaska and the initial group of six settling TAPS owners. Because we are terminating the dockets herein, we shall address whether AkPIRG may oppose the settlement approved by the Commission in its order of October 23, 1985. AkPIRG states that it is a citizen group organized to represent the interests of consumers and taxpayers before government agencies, and consequently it is interested in TAPS' rates as those rates impact on Alaska's taxes and royalties. But a mere interest in those rates is not enough to render AkPIRG aggrieved. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). AkPIRG must have a "particularized injury that sets [it] apart from the man on the street." *United States v. Richardson*, 418 U.S. 166, 194 (1974) (Powell, J., concurring). We see no such injury here, either direct or indirect. Hence, we find AkPIRG's interest insufficient to result in a contested settlement.

approval of the settlement. If, and when Arctic is actually aggrieved, it may contest TAPS' rates, including requesting reconsideration of our approval of the pooling agreement, *infra*, by filing a complaint or protest to a rate filing.⁵³ Furthermore, our approval of the Amendment to the TAPS Settlement Agreement here, and indeed our approval of the prior TAPS Settlement Agreement under our order of October 23, 1985, does not in any way limit or modify any of the rights of Arctic under the Interstate Commerce Act with regard to the terms, conditions and operation of the settlement.⁵⁴ To that extent, the respective procedural rights of Arctic and Alaska should not differ materially, despite Arctic's stated concerns to the contrary. Additionally, Arctic, as well as any entity which is not a party to the settlement, may file at any time in the future for an adjudicated rate, which does not exceed the settlement rate, under

⁵³ Alaska agrees that "by not imposing the settlement on [Arctic], the Commission will fully protect whatever rights [Arctic] has under the Interstate Commerce Act to seek future tariffs even lower than those filed by the TAPS Carriers pursuant to the settlement" (Brief opposing Arctic's exceptions at 5). The six original settling owners are in accord that Arctic has "the legal right to challenge rates filed by the TAPS carriers even if those rates comply with the ceiling established by [the settlement]" (Reply to Arctic's brief on exceptions at 18, 19).

⁵⁴ In its reply, Alaska questions whether the continuation of the present proceeding would serve any useful purpose, especially for Arctic. Alaska observes that Arctic has no interest in any refunds because it has never shipped oil through TAPS, that actual cost-of-service data exists in the record only through 1981, that the proceeding may be affected by our opinions in *Williams Pipe Line Co.*, 31 FERC ¶ 61,377 (1985) and 33 FERC ¶ 61,327 (1985), and that this docket is essentially locked-in. It is not for us to tell Arctic what will serve its purposes. But the points raised by Alaska are well taken. In the absence of Arctic's aggrievement, we do not think it would be prudent for us to continue this proceeding and force continued and protracted litigation on the settling parties.

the holding of *Sea-Land Service, Inc. v. ICC*.⁵⁵ Finally, while we will not here so condition our approval of the settlement, we encourage all of the parties to the original TAPS Settlement Agreement and the Amendment to the TAPS Settlement Agreement to seek a negotiated settlement at the earliest possible time with regard to Arctic's recoupment of litigation expenses in the proceedings before this Commission, paralleling the recoupment of Alaska's litigation expenses.

Section 5(1) Relief

Section II-2(f) of the Settlement Agreement has two provisions dealing with the allocation of certain costs among the settling TAPS owners beginning in 1986. In its order of October 23, 1985, the Commission granted the six settling owners' application for approval under section 5(1) of the Interstate Commerce Act⁵⁶ of Section II-2(f) as a pooling agreement for the reallocation of certain costs and revenues. On March 12, 1986, Amerada Hess and Sohio filed a motion in which they ask the Commission to find that "the pooling arrangement under Section II-2(f) of the TAPS Settlement Agreement with respect to Amerada Hess and Sohio is in the interest of better service to the public and economy of operation and will not unduly restrain competition. For the reasons given in the order of October 23, 1985, we so find."⁵⁷ Moreover, as requested by Amerada Hess and Sohio, we find that Amerada Hess and Sohio are authorized to participate as parties in the pooling arrangement.⁵⁸

⁵⁵ 738 F.2d 1311 (D.C. Cir. 1984).

⁵⁶ 49 U.S.C. § 5(1) (1976).

⁵⁷ 33 FERC at p. 61,140.

⁵⁸ Arctic contends that the pooling agreement has significant anti-competitive effects on Arctic now. We disagree. First, we have found that the pooling agreement will not unduly restrain competition. Second, the pooling agreement provision in question (Section

The Commission orders:

(A) The Amendment to TAPS Settlement Agreement filed in these dockets on March 12, 1986, is approved.

(B) Amerada Hess' and Sohio's request for approval under section 5(1) of the Interstate Commerce Act of a pooling agreement for the reallocation of certain costs and revenues is granted.

(C) The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

(D) The ALJs' Initial Decision of April 23, 1986, is affirmed, and Arctic's exceptions thereto are denied.

(E) The settlement and the rates thereunder are not imposed on Arctic which is not bound by the settlement. If and when Arctic is actually aggrieved, it may contest TAPS' rates, including requesting reconsideration of the Commission's approval of the pooling agreement. Our approval of the Amendment to TAPS Settlement Agreement and our approval of the prior TAPS Settlement Agreement in our order of October 23, 1985, does not in any way limit or modify any of the rights of Arctic under the Interstate Commerce Act with regard to the terms, conditions and operation of the settlement. Arctic, as well as any entity which is not a party to the settlement, may file at any time in the future for an adjudicated rate, which does not exceed the settlement rate.

(F) Docket Nos. OR78-1 and IS84-13-000 (including all subdockets and consolidated dockets) are hereby ter-

II-2(f)(ii) of the settlement) will not be operative until 1990 and will not be operational until TAPS is running at less than capacity. Hence, we fail to see how the pooling agreement will have any effect on Arctic until the 1990's, if ever. In any event, as observed by the six original settling owners in their reply, Arctic is not precluded from challenging the pooling agreement in the future.

minated upon issuance of this order, and to the extent inconsistent with the Settlement Agreement and the Amendment to TAPS Settlement Agreement, all protests in those dockets are denied. The evidentiary record made in this proceeding will be available to Arctic in the future. To the extent that the present record is material and relevant to the issues raised in any future proceeding, Arctic and any other participant in the present proceeding may request incorporation of the present evidentiary record into the record of the future proceeding.

(G) Arctic's motion for oral argument is denied.

APPENDIX D

[¶ 63,018]

Docket Nos. OR78-1-041, OR78-1-042 and OR78-1-043

TRANS ALASKA PIPELINE SYSTEM

Presiding Administrative Law Judges' Certification of
Settlement Proposal to the Commission

(Issued April 15, 1986)

Max L. Kane and Isaac D. Benkin, Administrative
Law Judges.

We are herewith certifying to the Commission a Stipulation and Offer of Settlement between the State of Alaska (Alaska), the United States Department of Justice (Justice), Amerada Hess Pipeline Corporation (Amerada), and Sohio Pipe Line Company (Sohio) which, if approved by the Commission, would effectively terminate the pending rate proceedings with respect to the transportation of oil by all eight of the carriers who own undivided interest in the Trans Alaska Pipeline System (TAPS).¹

The instant settlement proposal, as the earlier settlement proposal of the six other carriers, referred to in footnote 1, is opposed by Arctic Slope Regional Corporation (Arctic) and the Alaska Public Interest Research Group,² two parties who are neither carriers nor ship-

¹ This Settlement Offer is identical in all material aspects to the June 28, 1985 settlement proposal filed by Alaska and the six other carriers, which was approved by the Commission in its order issued October 23, 1985 (33 FERC ¶ 61,064).

² TOSCO Corporation also filed objections, renewing its comments objecting to the earlier six-carrier settlement. However, TOSCO's motion to intervene in these proceedings was denied by

pers. However, in its comments opposing the settlement and in its reply comments to the comments of the six carriers who supported the March 12th Settlement Offer, Arctic, without "waiving any of the objections to the settlement offer . . . nevertheless would withdraw its opposition to the Settlement Offer if the Commission were to approve the Settlement Offer subject to the modifications of the offer as it applies to ASRC." Arctic sets forth five conditions (Comments pp. 265, 257), and concludes that ". . . if the settlement is to be approved at all, there is 'no good reason' not to modify the Settlement as it applies to ASRC." (*Id.* at 259).

With respect to Arctic's proposal, it is well to note that the State of Alaska in its reply comments asserts that it is "prepared to accept the substance of ASRC's proposal if that proposal is lawful (as ASRC apparently believes it is), but, by the same token, ASRC would be irrevocably bound to a final resolution of the *TAPS* proceeding whether or not its proposal is lawful." On the other hand, the six *TAPS* owners in their Reply Comments indicate that they disapprove compliance with Arctic's conditions.

The proposed settlement is in all material aspects identical to the six-carrier settlement proposal we certified to the Commission on August 9, 1985, and which the Commission approved in its order of October 23, 1985. Approval of this proposal would write "finis" to the Commission's preoccupation with the *TAPS* proceeding in all its ramifications as far as the eight carriers and the other consenting participants are concerned. It would put into place a mechanism for calculating maximum tariffs that may be charged by the *TAPS* owners until the year 2011.

As far as non-signatory parties to the settlement are concerned, they will be free to challenge any tariffs filed

the Commission, but the Commission's denial is currently under judicial review.

pursuant to the settlement, which are subject to Commission jurisdiction, and which provide rates that they believe to be unjust and unreasonable.

There is no need to repeat our reasons set forth in our certification of August 9, 1985, for certifying the settlement proposal to the Commission for its consideration. Suffice it to say, the Commission in its order issued October 23, 1985, after considering the comments of ASRC, "approved the settlement with respect to the settling parties because it is fair and reasonable and in the public interest." Furthermore, said the Commission, "the settling parties are entitled to the benefits of their bargain and to not adopt the settlement would be contrary to the public interest." 33 FERC at p. 61,140.

We reiterate, for the reasons stated in our earlier certification, that it is "undeniably in the public interest to short-circuit this lengthy and expensive process by disposing of the *TAPS* proceeding through a negotiated settlement". Furthermore, since Sohio and Amerada should be considered in the same light as the carriers who executed the six-carrier settlement, no reason appears why they should be treated differently from such other carriers with respect to certification of their bargain.

We are mindful of the fact that the Commission had remanded the *TAPS* proceedings with regard to the non-settling parties to the six-carrier settlement agreement in order to allow the non-settling parties a hearing on the issues as applied to them. That hearing was held and concluded with the final submission of briefs. The record of that hearing and the briefs submitted are hereby certified to the Commission. We believe that there is nothing in that record that would restrict or prevent the Commission from considering the merits of the proposed settlement. There was no attempt made, and none was indicated in the testimony introduced, to impose the previous settlement on any non-signatory party. Whatever

rights Arctic, or any other non-signatory party had prior to the hearing remained intact.

In certifying this settlement proposal to the Commission, we wish to call attention to the fact that under Paragraph 4 (at p. 2) of the proposed Stipulation, Amerada and Sohio "shall each have the right to cancel its participation in this Offer of Settlement" if by May 31, 1986, the Commission "fails to approve an application made in accordance with Paragraph 3 . . .". Paragraph 3 refers to an approval of the application of a section of the Settlement Agreement for the pooling or division of traffic under Section 5(1) of the Interstate Commerce Act.

In consideration of the foregoing there are hereby certified to the Commission under the provisions of Rule 602 of the Rules of Practice and Procedure the following documents:

A. Stipulation and Offer of Settlement dated March 12, 1986, containing:

1. Proposed Order Approving Settlement;
2. Second Amendment to TAPS Settlement Agreement of 28 June 1985;
3. Explanatory Statement of the State of Alaska and the United States Department of Justice in support of Settlement Offer;
4. Explanatory Statement of Sohio Pipe Line Company in support of Settlement Offer;
5. Explanatory Statement of Amerada Hess Pipeline Corporation in support of Settlement Offer.

B. Initial Comments of Arctic Slope Regional Corporation in Opposition to the Settlement Proposal and Reply Comments to the carriers' comments.

C. Comments of TOSCO Corporation.

D. Comments recommending approval of proposed settlement:

1. Comments and reply comments of six TAPS carriers whose settlement has been approved by Commission;
2. Reply Comments of State of Alaska;
3. Reply Comments of Sohio;
4. Reply Comments of Amerada;
5. Reply Comments of FERC Staff supporting the agreement and adopting the reply comments filed with respect to the six-carrier settlement.

E. The record and briefs in the remanded proceedings in Docket Nos. OR78-1-041, OR78-1-042 and OR78-1-043.

APPENDIX E

[¶ 61,392]

Docket No. OR78-1-045

TRANS ALASKA PIPELINE SYSTEM

Docket No. IS83-29-002

BP PIPELINES INC.

Docket No. IS83-27-002

EXXON PIPELINE COMPANY

Order Denying Rehearing

(Issued December 19, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa, Charles G. Stalon, Charles A. Tra-bandt and C. M. Naeve.

On October 23, 1985, the Commission approved a Settlement Agreement between the State of Alaska and six of the eight TAPS owners—ARCO Pipe Line Company, BP Pipelines Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, and Union Alaska Pipeline Company.¹ As to the nonsettling parties, the Commission remanded the proceeding to the administrative law judges to enable the nonsettling parties to discuss at a hearing the settlement issues they have raised only as those issues apply to them.²

On November 1, 1985, the Arctic Slope Regional Corporation (Arctic) filed a request for rehearing. The Com-

¹ 33 FERC ¶ 61,064 (1985).

² *Id.*

mission finds that no arguments have been presented which warrant departure from the order of October 23, 1985. Therefore, the Commission will deny Arctic's request for rehearing. The Commission will, however, briefly address Arctic's arguments.

Certification and Approval of the Settlement

Arctic argues that the settlement was certified to and approved by the Commission in violation of the Commission's procedural rules. It asserts that the administrative law judges improperly certified the settlement which raised numerous issues of material fact and that the Commission improperly approved the settlement which is not supported by substantial evidence, raises genuine issues of material fact, and is unlawful.

Those issues of certification and approval of the settlement were addressed in the order of October 23, 1985. In that order, we found that the settlement was properly certified and approved under the Commission's rules and supported by case law.³ Arctic raises no new arguments here. Therefore, we deny rehearing on those issues.

Additionally, Arctic presents a summary of the settlement's alleged deficiencies to bolster its request for rehearing. However, the Commission has given Arctic a forum in which to present these arguments. The order of October 23, 1985, allows Arctic to air its specific objections to the Settlement Agreement at the hearing on remand as those issues apply to it.

The Remand

Arctic also argues that the remand of the proceeding with respect to the nonsettling parties violated its due process rights because the Commission's rules governing

³ *Id.* at p. 61,141, n. 3, at p. 61,139, and at p. 61,141, n. 11. *United Municipal Distributors Group v. F.E.R.C.*, 732 F.2d 202 (D.C. Cir. 1984).

settlements do not authorize such action. The Commission disagrees. First, the Commission's rules permit the severing and approval of uncontested portions of a settlement and the setting of contested portions of the case for hearing.⁴ Additionally, case law upholds this position. As the Commission stated in the order of October 23, 1985,⁵ the Commission's policy of preserving settlements for nonobjecting parties and permitting objecting parties to proceed to hearing was upheld in *United Municipal Distributors Group v. F.E.R.C. (United)*.⁶ Furthermore, the courts have found that our regulations confer upon the Commission the broad authority to take other action which the Commission deems appropriate when the Commission determines that the issue cannot be severed from the offer of settlement.⁷

Arctic next argues that the remand denies the non-settling parties an independent determination of a just and reasonable tariff, and argues that in *United* a non-settling party had that right. The Commission remanded the proceeding "to enable the nonsettling parties to discuss at a hearing the settlement issues they have raised only as those issues apply to them."⁸ Here, as in *United*, Arctic is afforded an opportunity to raise its issues at a hearing.

Finally, Arctic states that the remand violates the Interstate Commerce Act because the only purpose of the remand is to determine a separate tariff for nonsettling parties. We believe this argument is premature. In the order of October 23, 1985, we remanded the proceeding to enable the nonsettling parties to discuss at a hearing

⁴ 18 C.F.R. § 385.602(h)(1)(iii) (1982).

⁵ 33 FERC ¶ 61,064, at p. 61,141, n. 3.

⁶ 732 F.2d 202 (D.C. Cir. 1984).

⁷ *Id.*

⁸ 33 FERC ¶ 61,084, at p. 61,140 (1985).

the settlement issues they have raised. This does not necessarily mean a separate tariff for nonsettling parties will be determined. Indeed, that is only one of a number of conclusions which may be reached once the issues have been raised at hearing. Surely, Arctic does not question that the Commission's action is fully authorized by the Interstate Commerce Act or that the Commission has the authority to set a matter for hearing.⁹

The Commission orders:

The request for rehearing filed by the Arctic Slope Regional Corporation is denied.

⁹ Section 15 of the Interstate Commerce Act.

APPENDIX F

[¶ 61,064]

Docket Nos. OR78-1-036, -037, and -038

TRANS ALASKA PIPELINE SYSTEM

Docket No. IS83-29-000

EXXON PIPELINE COMPANY

Docket Nos. IS83-27-000, IS84-11-000 and IS85-8-000

Order Approving Settlement as to Settling Parties,
Granting Application, and Remanding Proceedings
as to Nonsettling Parties

(Issued October 23, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman;
A. G. Sousa and Charles G. Stalon.

On August 9, 1985, a proposed Settlement Agreement with respect to the Trans Alaska Pipeline System (TAPS) was certified to the Commission. The Settlement Agreement, which was filed on June 28, 1985, was executed by the State of Alaska (Alaska) and ARCO Pipe Line Company, BP Pipelines Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, and Union Alaska Pipeline Company. On July 3, 1985, a sixth TAPS owner, Phillips Alaska Pipeline Corporation, adopted the offer of settlement and agreed to the Settlement Agreement.¹ The Settlement Agreement will resolve all remaining issues before the Commission with respect to the settling owners and will remain in effect through the year 2011,

¹ Hereinafter the six pipeline companies will be referred to as the settling owners.

the stipulated life of the pipeline.² The Commission's trial staff and the United States Department of Justice (Justice) support the settlement. The settlement is opposed by two TAPS owners, Amerada Hess Pipeline Corporation (Amerada Hess) and Sohio Pipe Line Company (Sohio), and by the Arctic Slope Regional Corporation (Arctic) and the Alaska Public Interest Research Group (AkPIRG).

As discussed below, the Commission finds that the terms of the settlement are fair and reasonable and in the public interest for Alaska and the six settling owners. As to those parties, the settlement is approved. As to the parties opposing the settlement, the Commission will not at this time impose the terms of the settlement on them. As discussed below, they may proceed to an expeditious hearing to air the issues they have raised as those issues apply to them.³

The Settlement Agreement

The centerpiece of the Settlement Agreement is the complex TAPS Settlement Methodology (TSM). The TSM will be used to determine the maximum interstate tariffs for TAPS for each year beginning January 1, 1986. Before describing the TSM, the Commission shall briefly list the prominent provisions of the Settlement Agreement. These are:

(1) The six settling owners shall pay refunds estimated to be \$500 million with respect to their rates for the years 1982-1985, plus interest thereon at the rates

² The Settlement Agreement may be renegotiated after the year 2006 upon notice by any party.

³ The Commission's public policy of preserving settlements for non-objecting parties and permitting objecting parties to proceed to hearing was upheld in *United Municipal Distributors Group v. F.E.R.C.*, 732 F.2d 202 (D.C. Cir. 1984), *aff'g United Gas Pipe Line Co.*, 22 FERC ¶ 61,094, *reh'g denied*, 23 FERC ¶ 61,101 (1983).

provided for in the Commission's regulations.⁴ There shall be no refunds for transporting petroleum delivered prior to January 1, 1982.⁵

(2) The rates for the transportation of petroleum delivered between January 1, 1982, and December 31, 1985, shall be calculated as follows:

Year	Rate per Barrel ⁶
1982	\$6.05
1983	\$5.93
1984	\$5.63 ⁷
1985	\$5.31 ⁸

(3) The TAPS investment base is reduced by \$450 million as of 1976 with that amount to be amortized from 1978-1984. This is in settlement of cost of construction and other issues in Phase II of the TAPS proceeding.

(4) The six settling owners shall pay approximately \$23 million to Alaska to reimburse the state for its litigation expenses.⁹

The salient provisions of the TSM are:

(1) The rate base is divided into an original rate base (essentially pre-1985) and a new rate base. A real

⁴ 18 C.F.R. § 340.1(c).

⁵ TAPS commenced operations in the summer of 1977.

⁶ These rates were calculated pursuant to the TSM.

⁷ This rate is subject to the net carryover provision discussed below in the text of this order.

⁸ This rate is also subject to the net carryover provision.

⁹ The Settlement Agreement provides for a payment to Alaska of \$35 million to be divided among the eight owners according to their respective composite ownership shares in TAPS. Because Sohio and Amerada Hess are not parties to the Settlement Agreement and together own about 35 percent of TAPS, the estimated amount to be paid by the six settling owners is approximately \$23 million.

(inflation-free) rate of return on equity of 6.4 percent is applied to the original rate base through 1989 and to the new rate base throughout the life of the settlement. Beginning in 1990, an allowance per barrel of \$0.35 is provided, as adjusted for inflation after 1983. Inflation shall be determined by using the Consumer Price Index for All Urban Consumers (CPI-U).

(2) Both the original and new rate bases are adjusted for inflation according to the CPI-U, with annual depreciation subtracted before the inflation adjustment is made. The settling owners are entitled to recover this adjustment as deferred return.

(3) The depreciation schedule, which is based on an accelerated unit-of-production method, is fixed and is heavily weighted towards the earlier years.

(4) The dismantling, removal, and restoration expense is fixed at \$849 million with recovery based on an accelerated schedule. Hence, this expense is also front-end loaded.

(5) Income taxes are calculated on a normalized basis using the statutory rate and assuming that all income derived from TAPS is earned by a single corporation with no other income. Deferred income taxes are deducted from rate base.

(6) A net carryover provision provides that revenue excesses or deficits in a given year be subtracted or added, as the case may be, to the next year's total revenue requirement for a settling owner.¹⁰

Procedural Objection

In a motion filed on September 10, 1985, Arctic argues that the Settlement Agreement was improperly certified

¹⁰ The Settlement Agreement provides that the settling owners will provide refund information and data supporting their tariffs to Alaska.

under the Commission's rules. Sohio, in its comments to the settlement, and AkPIRG, in an answer to Arctic's motion, agree with Arctic. However, the Commission has recently approved a certification where there were both settling and nonsettling parties to an offer of settlement where facts were in dispute.¹¹ The judges could have retained this case *vis a vis* the nonsettling parties. Their decision not to do that, in light of the significance of the TAPS proceeding and the importance of this settlement was proper, because the Commission is providing the nonsettling parties with a hearing on the issues they have raised as those issues apply to them.

In its motion, Arctic also argues that it was denied the opportunity to respond to the settling owners' reply comments which for the first time contained citations to the record in support of the Settlement Agreement. Because the Commission is remanding the offer of settlement as to Arctic and the other nonsettling parties, Arctic will have ample opportunity to respond to the settling owners' record citations. Hence, the Commission denies Arctic's motion.

Discussion

The Commission recognizes the TAPS proceeding is unique. To begin with, TAPS itself is a unique pipeline, as is illustrated merely by its description, i.e. a 48-inch diameter petroleum pipeline that extends over 800 miles from the Alaskan North Slope to the all-weather port of Valdez on the Pacific coast of Alaska. Second, the amounts of monies involved are huge. For example, TAPS was constructed between 1974 and 1977 at a cost of over \$9 billion. The TAPS owners collect rates aggregating approximately \$10 million per day for the service they

¹¹ *Northwest Pipeline Corp.*, 31 FERC ¶ 61,263, at p. 61,516 (1985), *reh'g denied*, 32 FERC ¶ 61,410 (1985). See also note 3, *supra*.

perform in transporting over 1.5 million barrels of oil per day. Third, the main contestants of the TAPS owners in this proceeding have been Alaska, Justice, and Arctic rather than the actual TAPS ratepayers (the shippers).

Alaska's interest stems from the effect of TAPS' rates on the wellhead price of Alaskan North Slope oil on which Alaska earns royalties and collects taxes. Because TAPS' rates reduce the wellhead value of the oil, Alaska is interested in lower rates to enhance its revenues and to encourage the efficient development of the North Slope.¹² In addition, Alaska is interested in the profile of TAPS' rates, because that affects the timing of its revenues. Justice's interest in the TAPS case is to ensure a reasonable return to the TAPS owners that will not discourage the "greatest possible competitive development of Alaskan North Slope energy resources."¹³ Justice joins Alaska in the belief that their aims can best be accomplished by a long-term settlement which adopts a comprehensive cost-based methodology that provides a rational and predictable tariff profile over time which is economically efficient.¹⁴ Alaska and Justice agree that the TSM is such a methodology. They argue that the TSM is a predictable, yet flexible, modified cost-based methodology that will last until 2011, the stipulated life of the pipeline.¹⁵ Moreover, Alaska and Justice point out that the TSM will provide a declining tariff profile similar to that which results from a depreciated original cost methodology.¹⁶ This type of profile should, as time goes by,

¹² Explanatory Statement of the State of Alaska and the United States Department of Justice In Support of Settlement Offer at 18.

¹³ *Id.* at 19.

¹⁴ *Id.* at 21.

¹⁵ *Id.* at 22, 23.

¹⁶ *Id.* at 22.

encourage competitive exploration for Alaskan oil and enhance Alaska's future oil-related revenues.

As indicated above, the Commission will approve the settlement with respect to the settling parties because it is fair and reasonable and in the public interest. The settling parties have fashioned an innovative methodology which achieves their respective aims in this proceeding. The settlement is a comprehensive, long-term settlement of complex issues in a hotly contested, lengthy and expensive proceeding. Such settlements necessarily involve compromises by the parties from their litigation positions. Otherwise, settlements such as this one, which are to be encouraged and which are in the interests of this Commission, the regulated companies, their customers, other parties such as Alaska and Justice, and the public would not be possible. The Commission strongly believes the settling parties are entitled to the benefits of their bargain and to not adopt the settlement would be contrary to the public interest.

Nonetheless, the Commission acknowledges the concerns of the nonsettling parties and shall remand the proceedings with regard to them to the administrative law judges to allow the nonsettling parties a hearing only on those issues which apply to them.¹⁷

Section 5(1) Relief

Section II-2(f) of the Settlement Agreement has two provisions dealing with the allocation of certain costs among the settling TAPS owners beginning in 1986. On September 3, 1985, five of the settling owners filed

¹⁷ Because the Commission is remanding the proceeding to enable the nonsettling parties to air their objections at a hearing and because the Commission is not at this time imposing the terms of the Settlement Agreement on any nonsettling party, the Commission sees no reason to discuss the specific objections to the Settlement Agreement raised by AkPIRG, Arctic, Sohio, and Amerada Hess. There is also no need to decide AkPIRG's motion to supplement its comments.

an application for Commission approval of Section II-2 (f) as a pooling agreement under section 5(1) of the Interstate Commerce Act.¹⁸ On September 12, 1985, the sixth settling owner, BP Pipelines, Inc., filed a statement in support of the September 3, 1985, application. Arctic opposed the granting of the application. Herein, the Commission grants the application of the settling owners.

The settling owners are concerned that the revenue and cost reallocation provisions might be considered to be pooling arrangements under section 5(1) of the Interstate Commerce Act, because both involve divisions of revenues in ways other than percentage ownership in the pipeline.¹⁹ Section 5(1) of the Interstate Commerce

¹⁸ Section 5(1) of the Interstate Commerce Act, provides that:

"[e]xcept upon specific approval by order of the Commission . . . it shall be unlawful for any common carrier . . . to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof . . . Provided, that whenever the Commission is of [the] opinion, after hearing . . . , that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy of operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division . . ."

¹⁹ TAPS has two portions—the pipeline facilities and the terminal facilities. The first cost allocation provision (Section II-2 (f)(i) of the Settlement Agreement) provides that for the years 1986-1989, costs shall be reallocated to take account of the fact that an owner's share of pipeline ownership is not the equivalent of its ownership share of the composite TAPS system, which includes TAPS' terminal facilities. This provision reallocates revenue based on the composite TAPS ownership shares instead of on the basis of pipeline-only ownership. Hence, all costs, including terminal costs, will be borne by the owners in proportion to actual composite ownership.

The second settlement provision relates to petroleum delivered after 1989 and allocates certain costs based on throughput (Section

Act has two tests for the authorization of a pooling arrangement. First, the pooling must be "in the interest of better service to the public or of economy of operation." Second, the pooling must "not unduly restrain competition."

Arctic argues that those tests have not been met and that a hearing on this issue must be held. The Commission disagrees. The Commission sees no reason to hold a hearing on this matter. First, the Commission believes the reasons given in this order support its decision without the need for more evidence. Second, all parties have had ample opportunity to present their views. Third, TAPS is at present running at capacity. Therefore, any such hearing would be a waste of time, money, and other resources.²⁰

II-2 (f)(ii) of the Settlement Agreement). Under the Settlement Agreement, TSM revenues are allocated on the basis of throughput. But under the TAPS Operating Agreement certain common TAPS operating costs are allocated according to ownership percentage. When TAPS is operating at capacity, there is no problem. At some point, however, throughput may fall below capacity, and a mismatch in the allocation of revenues and costs may occur. In that event, a settling owner receiving deliveries below its pro-rata ownership share of aggregate actual throughput would be unable to collect all its costs while a settling owner receiving deliveries above its pro-rata ownership share would collect costs incurred by other settling carriers. This settlement provision mitigates any potential imbalance problem by providing for cross payments among the settling owners, through an agent, to reallocate certain costs on the same basis as TSM revenues (actual throughput).

²⁰ Arctic also asserts that the filing of the application should be noticed in the *Federal Register*. No such notice is required by the Interstate Commerce Act. Additionally, the Commission did not separately notice the section 5(1) application in the *Federal Register*, because the pooling arrangement is part of the Settlement Agreement certified to the Commission by the administrative law judges. Moreover, the applicants gave actual notice of the application to Arctic and all other parties to the TAPS proceeding. Indeed, Arctic responded to that application. Hence, they have had ample opportunity to present their views.

The Commission will approve Section II-2(f) of the Settlement Agreement under section 5(1) of the Interstate Commerce Act because it meets the requirements of that Act and because it is also in the public interest. Section II-2(f) is in the interest of better service to the public and economy of operation, because it is an integral part of a settlement which will provide predictability and certainty relating to TAPS rates which will enable shippers and potential shippers to plan more efficiently for the exploration and production of Alaskan oil. Moreover, the declining profile of the TAPS rates should encourage the quest for and production of new reservoirs of oil when current North Slope production is declining. This is in the interest of both Alaska and the nation.

The Commission also finds that Section II-2(f) will not unduly restrain competition. First, Section II-2(f) (i) is operational from 1986-1989 when TAPS is highly likely to be operating at capacity. Hence, the TAPS owners will not be able to compete with each other. Moreover, this provision merely reallocates terminal costs to their rightful owner. Second, Section II-2(f) (ii) does pool certain costs.²¹ But it does not pool costs related to return such as the recovery of deferred return, the after-tax allowance of \$0.35 (as adjusted for inflation), the return of 6.4 percent on new rate base, and the associated income tax allowance. The exclusion of those costs from the pooling arrangement will provide the owners with an incentive to compete to earn their return.²² The Com-

²¹ Those reallocated costs include non-variable operating expenses, state ad valorem and other taxes on property, the dismantling, removal, and restoration expense and depreciation.

²² This return incentive effectively vitiates the reason for a pooling arrangement. As stated by Posner and Easterbrook, *Antitrust* (2d Ed. 1981) in the note at 100:

"A pool is a particularly effective form of cartel in which the members pool their sales revenues. If effective, the pool reduces the incentive to cheat by selling below the cartel price since any additional revenues obtained by cheating would go

mission does not foresee that Section II-2(f) will restrain competition. Therefore, the pooling arrangement in Section II-2(f) meets the standards of section 5(1) of the Interstate Commerce Act.

The Commission orders:

(A) The Settlement Agreement filed in these dockets on June 28, 1985, is approved as to those parties who support the settlement.

(B) As to the nonsettling parties, the Commission remands the proceeding to the administrative law judges to enable the nonsettling parties to discuss at a hearing the settlement issues they have raised only as those issues apply to them. An expeditious hearing schedule shall be followed with the record closed and an initial decision transmitted to the Commission within six months of the date of issuance of this order.

(C) The settling owners' application for approval under section 5(1) of the Interstate Commerce Act of a pooling agreement for the reallocation of certain costs and revenues is granted.

(D) The six settling owners' refund obligation in these dockets is terminated except as to those refunds required by the Settlement Agreement.

(E) The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

(F) Docket Nos. IS83-27-000, IS83-29-000, IS84-11-000, and IS85-8-000 are moot and are hereby terminated upon issuance of this order approving the settlement agreement.

into the pool and be shared with the other members of the cartel."

Here, each owner retains its own return revenues and is at risk as to whether it will earn those revenues. Hence, there is an incentive to compete.

APPENDIX G

[¶ 63,058]

Docket Nos. OR78-1-036, OR78-1-037, and OR78-1-038
(Phases I and II)

TRANS ALASKA PIPELINE SYSTEM

**Presiding Administrative Law Judges' Certification of
Settlement Proposal to the Commission**

(Issued August 9, 1985)

Max L. Kane and Isaac D. Benkin, Presiding Administrative Law Judges.

We are herewith certifying to the Commission a settlement proposal which, if accepted by the Commission, would terminate the pending rate proceedings with respect to the transportation of oil by six of the eight carriers who own undivided interests in the Trans Alaska Pipeline System (TAPS). The settlement proposal was filed on June 28, 1985. It had been negotiated by, and the settlement agreement was executed by, the State of Alaska and five of the carriers: ARCO Pipe Line Company, BP Pipelines, Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, and Union Alaska Pipeline Company. In addition, the United States Department of Justice joined the signatories in submitting the agreement to the Commission and urging its approval. Thereafter, a sixth TAPS carrier, Phillips Alaska Pipeline Corporation, on July 3, 1985 filed a stipulation under which it adopted the offer of settlement and agreed to be bound by the filed settlement agreement. The June 28, 1985 submission superseded an earlier settlement agreement, filed April 30, 1985, between the State and two carriers, BP and ARCO. Like the later agreement, the earlier

settlement was endorsed by, but not executed by, the U.S. Department of Justice.

The instant settlement proposal is contested. Adverse comments were filed by the two non-consenting carriers, Amerada Hess Pipeline Corporation and Sohio Pipe Line Company. The latter, owner of the largest (33.3367%) share of the TAPS carrier property, also filed adverse comments on behalf of its shipper-producer affiliate, Sohio Alaska Petroleum Company. In addition, comments opposing the settlement came from Arctic Slope Regional Corporation, the Alaska Public Interest Research Group, and Alaska Oil Company.

Under the settlement proposal, tariff rates for the transportation of oil in interstate commerce through TAPS would be established for each of the carrier parties to the agreement for all years of the System's operation from its opening in 1977 through 2011. The methodology for computing those rates is dubbed the "TAPS Settlement Methodology" or TSM. The TSM is a complex model; 16 closely printed pages of the agreement, plus a number of appendices thereto, are devoted to defining it. Its result, however, is rather simple: the tariffs are "front-end loaded" over time, so that proportionately more of the System's revenue requirements are recovered during the early years (largely past years by now) of TAPS operations than are recovered during the later years. This has two principal consequences. First, it diminishes considerably the signatory carriers' potential obligation to pay refunds to shippers whose oil has been transported through the System during the early years of its operation. Second, it provides for relatively low transportation rates in future years, when decisions about the development *vel non* of marginal oil reserves in northern Alaska will be made. The latter feature is most attractive to the State of Alaska, as the State faces the prospect of inducing private capital to continue oil exploration and development on the North Slope and its

environs after the rich fields now in production begin to play out. The former feature of the TSM induces vociferous opposition from shippers who, like Sohio Alaska Petroleum Co., have large potential refund claims owing to high volumes of oil shipped via the System in the early years of its operation.

Opponents of the settlement proposal have pointed to a number of aspects of the TSM that, they say, preclude us from certifying it to the Commission for consideration under Rule 602 of the Procedural Rules. These features allegedly give rise to material issues of fact that, it is claimed, must be decided before the settlement proposal can be approved or rejected on the merits, issues of fact that allegedly cannot be decided on the basis of evidence in the existing hearing record.

While these arguments have a great deal of force, we have nevertheless decided that this settlement proposal should be certified to the Commission for its consideration without dealing at this level with the technical intricacies of Rule 602(h)(2)(ii) and its application to the arcana of the TSM. We believe that this is the appropriate step in light of the special circumstances of the *TAPS* proceeding, and that Rules 101(e) and 504(b) authorize us to do so.

By any measure, *TAPS* is a special case. It is gargantuan in terms of the size of the administrative record (almost 60,000 pages of transcript and over 100,000 pages of exhibits), the amount of time that has been devoted to litigation (more than seven years, with no end yet in sight), and the expenses that have been incurred by all parties to the proceeding. If the proceeding continues on its present course, Phase II briefing will be completed by next January, an initial decision will be issued some time thereafter, the Commission will be in a position to issue its final decision on both Phase I and Phase II, and all the parties will undoubtedly continue

the costly and burdensome combat in the Federal court system, where judicial review of the administrative dispositions will take place.

It is undeniably in the public interest to short-circuit this lengthy and expensive process by disposing of the *TAPS* proceeding through a negotiated settlement, if that can lawfully be done. The settlement proposal we are herewith certifying was the result of months of arduous and intricate negotiations. It would, if adopted, place into effect novel and imaginative solutions to disputes that have had the parties at loggerheads for many years. As a result of the many months of rigorous negotiations, six of the eight *TAPS* carriers and all of the participants who have carried the laboring oars in opposing the carriers in this proceeding have arrived at a mutually acceptable resolution of the controversies at issue in this proceeding, as well as any future rate dispute that may arise prior to the year 2012. They want to put an end to their litigation on the basis of that agreement. In the circumstances, their proposal is surely worthy of the most serious consideration by the Commission. To brush it aside on the basis of a procedural technicality at this stage would be irresponsible.

In certifying this settlement proposal to the Commission, we wish to call particular attention to the fact that under Section III-2 (at p. 24) of the Settlement Agreement, any signatory party may terminate its participation in the settlement "if FERC fails to approve or reject this Agreement by 30 November 1985."

In consideration of the foregoing, there are hereby certified to the Commission under the provisions of Rule 602 of the Rules of Practice and Procedure the following documents:

A. The offer of settlement, filed June 28, 1985, consisting of—

(1) Explanatory Statement of the State of Alaska and the United States Department of Justice in Support of Settlement Offer.

(2) Stipulation and Offer of Settlement, dated June 28, 1985.

(3) Proposed Order Approving Settlement.

(4) Settlement Agreement, dated 28 June 1985, between the State of Alaska and ARCO Pipe Line Company, BP Pipelines, Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, and Union Alaska Pipeline Company.

(5) Second Amendment to the ARCO Settlement Agreement.

(6) Second Amendment to the BPP Settlement Agreement.

(7) Explanatory Statement of Union Alaska Pipeline Company in Support of Settlement Offer.

B. Documents making Phillips Alaska Pipeline Corporation a party to the Settlement Agreement, consisting of—

(1) Amendment to TAPS Settlement Agreement of 28 June 1985.

(2) Stipulation Adopting Offer of Settlement.

C. Initial comments on the settlement proposal, consisting of—

(1) Initial Comments of the Commission Staff on Stipulation and Agreement.

(2) Alaska Oil Company's Comments on Proposed Settlement Offer.

(3) Statement of Alaska Public Interest Research Group in Opposition to the Settlement . . .

(4) Comments of Amerada Hess Pipeline Corporation In Qualified Opposition to Offer of Settlement.

(5) Comments of Sohio Pipe Line Company and Sohio Alaska Petroleum Company in Opposition to Settlement Offer.

(6) Comments of Arctic Slope Regional Corporation on the Offer of Settlement . . .

(7) Comments of Tosco Corporation on Offer of Settlement.

D. Reply comments on the settlement proposal, consisting of—

(1) Reply of the United States Department of Justice to Comments on the June 28, 1985 Offer of Settlement.

(2) Reply Comments of the State of Alaska.

(3) Reply Comments of Arctic Slope Regional Corporation to Comments of Sohio Pipeline Company and Sohio Alaska Petroleum Company In Opposition to Settlement Offer.

(4) Reply Comments of the Settling Carriers on the Offer of Settlement . . .

(5) The Federal Energy Regulatory Commission Staff's Reply Comments on Settlement Offer.

E. Transcript of a technical conference held before the undersigned on June 20, 1985, consisting of pages 59,519-59,586 of the transcript in this proceeding.

APPENDIX H

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. OR78-1-011, OR78-1-014, OR87-1-016
(Phases I and II)

TRANS ALASKA PIPELINE SYSTEM

PRESIDING ADMINISTRATIVE LAW JUDGES'
ORDER DENYING MOTION TO SEVER PARTIES,
CERTIFY A SETTLEMENT OFFER AS UNCON-
TESTED, AND ESTABLISH PROCEDURES FOR
CONSIDERATION OF THE OFFER AS DISPOSI-
TIVE

(July 26, 1985)

On April 30, 1985, a settlement agreement executed by the State of Alaska, on the one hand, and ARCO Pipe Line Company and BP Pipelines, Inc., on the other, was filed with the Commission. Before the settlement agreement became ripe for action by the Presiding Judges, it was superseded by a second settlement agreement, filed on June 28, 1985. The parties to the second agreement were also parties to the first one; however, they were joined by three additional TAPS carriers: Exxon Pipeline Company, Mobil Alaska Pipeline Corporation, and Union Alaska Pipeline Company. Subsequently, a sixth carrier, Phillips Alaska Pipeline Corporation, executed the second settlement agreement. This left two carriers, Amerada Hess Pipeline Corporation (the owner of a 1.5% interest in the system) and Sohio Pipe Line Company (a 33.3367% owner of TAPS) outside the circle of carriers who had negotiated settlement agreements with the State.

On June 18, 1985, the State and the Department of Justice, the latter having announced that it wholeheart-

edly supported the settlement agreements, filed a motion asking us to take three steps with regard to the offer of settlement. First, we are asked to sever the proceeding with respect to the participants who are opposed to the settlement proposal from the remaining participants. Second, we are asked to treat the settlement proposal as uncontested with respect to the carriers who have joined in the settlement agreements and to certify it as uncontested to the Commission under the provisions of Rule 602(g) of the Rules of Practice and Procedure. Third, the motion seeks to have us institute procedures, which may include a limited-scope hearing, looking towards the imposition of the terms of the settlement agreement on non-consenting parties as the disposition of this proceeding on the merits. Support for the Alaska-Department of Justice motion was expressed by the FERC Trial Staff. Amerada Hess, Sohio Pipe Line Company and its affiliate, Sohio Alaska Petroleum Company, and Arctic Slope Regional Corporation, filed answers in opposition to the motion.

We deny the motion.

Although a great deal of the discussion in the motion papers is focussed on the issue of the authority of the Judges and the Commission to sever the nonconsenting parties to a proceeding from those who have joined in a settlement agreement and to treat the settlement as uncontested with respect to the latter group, we do not regard that issue as dispositive, or even important. Assuming, *arguendo*, that precedents such as *United Gas Pipeline Co.*, 23 FERC ¶ 61,101 (1983), *aff'd. sub nom. United Municipal Distributors Group v. FERC*, 732 F.2d 202 (D.C. Cir. 1984) exemplify the *power* of the Commission to take the steps requested by the Department of Justice—State of Alaska motion, the question remains whether, in the context of this case, those steps represent a wise and just course of action. We think they do not.

First. It is obvious that the three forms of relief sought in the motion must be viewed in *pari materia*. Severance of some of the participants from the others is sought, not for its own sake, but in order to treat the settlement proposal as uncontested with respect to those carriers that have joined in it. Examination of the initial round of comments that have been filed on the settlement agreement (the reply comments are yet to come) demonstrates the settlement proposal will be a contested one even with respect to the consenting carriers. This is the case because adverse comments have been filed on behalf of a number of shipper parties. Therefore, no useful purpose would be served by granting the severance requested in the motion.

Second. The basic purpose that was served in other cases by severing the proceeding with respect to non-consenting parties could not possibly be served in the present posture of this proceeding. In the cases in which this procedure has been utilized heretofore, the severance was able to save the consenting parties from incurring the burden and expense of a lengthy formal hearing. In addition, the contesting parties were frequently interested in litigating only a few of the potential issues in the proceeding, and the severance enabled the Commission to limit the scope of the hearing that was required. In *TAPS*, the hearing has already been held. It consumed 413 hearing days and accumulated almost 60,000 pages of transcript and a roomful of exhibits. In this context, it is feckless to argue, as the State and the Justice Department do, that a severance at this stage will serve to carry out the Commission's policy of encouraging settlements in order to "eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own." (Motion, p. 9, quoting from *National Fuel Gas Supply Corp.*, 27 FERC ¶ 61,111 at p. 61,211 (1984)).

Third. There is no authority for the convening of an additional proceeding which would undoubtedly involve further hearings and briefs, to resolve the question whether the settlement agreement should be imposed on non-consenting parties as the disposition of the merits of the case. While it is true, as the State and the Department argue, that the Commission is duty-bound to consider the offer of settlement as the basis for disposition of the merits, Rule 602 clearly contemplates that such consideration will take place based upon the hearing record that has already been compiled. That is why, for instance, subdivision (h) (2) (iii) (A) of the Rule allows certification of a contested settlement if, *inter alia*, the parties concur in a motion under Rule 710 for omission of the initial decision. The suggestion that we now proceed to convene an auxiliary hearing for the limited purpose of adducing evidence bearing on the merits of the settlement proposal cannot, in our view, be considered varied under the Commission's procedural scheme for handling settlements.

In addition, we must consider the rights of the non-consenting parties in determining whether to grant the relief sought by the State of Alaska and the Department of Justice. All of the shippers who have filed comments on the settlement proposal have expressed opposition to it. They, and other non-consenting parties, have the right to have their comments considered on the merits and to have the Commission decide whether, on the basis of the record thus far compiled, the rates charged by the carriers have been lawful under the Interstate Commerce Act. That statute, as the Commission recognized in Opinion No. 154 (21 FERC ¶ 61,260 (1982), *reversed on other grounds sub nom. Farmers Union Central Exchange v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984)), imposes on the Commission a shipper-protection mission in carrying out its oil pipeline regulation duties. Consequently, it is neither lawful nor appropriate to adopt the

suggestion that we initiate proceedings for the purpose of imposing the settlement proposal upon unwilling parties in general and unwilling shippers in particular.

In so ruling, we recognize that there is a strong public policy in favor of disposing of proceedings by negotiated settlement rather than by a litigated decision on the merits. We emphatically affirm our adherence to that policy. Nevertheless, we must recognize that there are other, and sometimes countervailing, interests to be served. Among them is the goal of achieving a result that is just for all interested persons and that does not run roughshod over the legitimate rights of any participant. Fidelity to that goal precludes us from granting to Alaska and the Department of Justice the relief they have sought in their June 18, 1985 motion.

Accordingly, the motion is in all respects DENIED.

/s/ Max L. Kane
MAX L. KANE
Presiding Administrative
Law Judge

/s/ Isaac D. Benkin
ISAAC D. BENKIN
Presiding Administrative
Law Judge

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1115

ARCTIC SLOPE REGIONAL CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents

STATE OF ALASKA,
AMERADA HESS PIPELINE CORP.,
ARCO PIPE LINE COMPANY,
EXXON PIPELINE CO.,
SOHIO ALASKA PIPELINE CO.,
UNION ALASKA PIPELINE CO.,
BP PIPELINES INC.,
MOBIL ALASKA PIPELINE CO.,
PHILLIPS ALASKA PIPELINE CORP.,
Intervenors

No. 86-1427

ARCTIC SLOPE REGIONAL CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents

AMERADA HESS PIPELINE CORP.,
EXXON PIPELINE Co.,
ARCO PIPE LINE COMPANY,
BP PIPELINES INC.,
MOBIL ALASKA PIPELINE Co.,
UNOCAL PIPELINE Co.,
PHILLIPS ALASKA PIPELINE CORP.,
STATE OF ALASKA,
SOHIO ALASKA PIPELINE Co.,
Intervenors

[Filed Oct. 27, 1987]

PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

Before: RUTH B. GINSBURG, STARR, and NIES*,
Circuit Judges.

JUDGMENT

These causes came on to be heard on the petitions for
review of orders of the Federal Energy Regulatory Com-

* Of the United States Court of Appeals for the Federal Circuit,
sitting by designation pursuant to 28 U.S.C. § 291(a).

mission, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the petitions for review are hereby denied, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: October 27, 1987

Opinion for the Court filed by Circuit Judge Starr.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1115

ARCTIC SLOPE REGIONAL CORPORATION

v.

FEDERAL ENERGY REGULATORY COMMISSION and
UNITED STATES OF AMERICA

And Consolidated Case No. 86-1427

[Filed Jan. 15, 1988]

BEFORE: RUTH B. GINSBURG and STARR, Circuit
Judges, and NIES*, Circuit Judge, U.S.
Court of Appeals for the Federal Circuit

ORDER

Upon consideration of the petition of Arctic Slope Regional Corporation for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

* Sitting by designation pursuant to 28 U.S.C. § 291(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1115

ARCTIC SLOPE REGIONAL CORPORATION

v.

FEDERAL ENERGY REGULATORY COMMISSION and
UNITED STATES OF AMERICA

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges; Nies*, Circuit Judge, U.S. Court of Appeals for the Federal Circuit

ORDER

The suggestion of Arctic Slope Regional Corporation for rehearing *en banc* has been circulated to the full court. No member of the court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:

Constance L. Dupre
Clerk

By: /s/ Robert A. Bonner
Deputy Clerk

Circuit Judge Silberman did not participate in this order.

* Sitting by designation pursuant to 28 U.S.C. § 291(a).

APPENDIX K

STATUTORY AND REGULATORY
PROVISIONS INVOLVED

49 U.S.C. § 1(5) (a) provides:

(5) Just and reasonable charges; applicability; criteria for determination

(a) All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. The provisions of this subdivision shall not apply to common carriers by railroad subject to this chapter.

49 U.S.C. § 5(1) provides:

§ 5. Combinations and consolidations of carriers

(1) Pooling; division of traffic, service, or earnings

Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent in-

licated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further*, That any contract, agreement, or combination to which any common carrier by water subject to Chapter 12 of this title is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on September 18, 1940, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

49 U.S.C. § 13 provides in pertinent part:

§ 13. Complaints to and investigations by Commission

(1) Complaint to Commission of violation of law by carrier; reparation; investigation

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this

chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Complaints by State commissions; inquiry on Commission's own motion; expenses of State commissions

Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission or any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. And the said Com-

mission shall have the same powers and authority to proceed with any inquiry instituted on its motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence or direct damage to the complainant. Representatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide.

49 U.S.C. § 15(1) provides:

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(1) Commission empowered to determine and prescribe rates, classifications, etc.

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or

unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

49 U.S.C. § 15(7) provides:

(7) Commission to determine lawfulness of new rates; suspension; refunds; nonapplicability to common carriers by railroads subject to chapter

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice,

to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regu-

lation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. This paragraph shall not apply to common carriers by railroad subject to this chapter.

18 C.F.R. § 385.602 provides in pertinent part:

§ 385.602 Submission of settlement offers (Rule 602).

* * * *

(g) *Uncontested offers of settlement.* (1) If comments on an offer are transmitted to the presiding officer and the presiding officer finds that the offer is not contested by any participant, the presiding officer will certify to the Commission the offer of settlement, a statement that the offer of settlement is uncontested, and any hearing record or pleadings which relate to the offer of settlement.

(2) If comments on an offer of settlement are transmitted to the Commission, the Commission will determine whether the offer is uncontested.

(3) An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

(h) *Contested offers of settlement.* (1) (i) If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.

(ii) If the Commission finds that the record lacks substantial evidence or that the contested issues can

not be severed from the offer of settlement, the Commission will:

(A) Establish procedures for the purpose of receiving additional evidence before a presiding officer upon which a decision on the contested issues may reasonably be based; or

(B) Take other action which the Commission determines to be appropriate.

(iii) If contested issues are severable, the uncontested portions may be severed and decided in accordance with paragraph (g) of this section.

(2) (i) If any comment on an offer of settlement is transmitted to the presiding officer and the presiding officer determines that the offer is contested, whole or in part, by any participant, the presiding officer may certify all or part of the offer to the Commission. If any offer or part of an offer is contested by a party, the offer may be certified to the Commission only if paragraph (h) (2) (ii) or (iii) of this section applies.

(ii) Any offer of settlement or part of any offer may be certified to the Commission if the presiding officer determines that there is no genuine issue of material fact. Any certification by the presiding officer must contain the determination that there is no genuine issue of material fact and any hearing record or pleadings which relate to the offer or part of the offer being certified.

(iii) Any offer of settlement or part of any offer may be certified to the Commission, if:

(A) The parties concur on a motion for omission of the initial decision as provided in Rule 710;

(B) The presiding officer determines that the record contains substantial evidence from which the

Commission may reach a reasoned decision on the merits of the contested issues; and

(C) The parties have an opportunity to avail themselves of their rights with respect to the presentation of evidence and cross-examination of opposing witnesses.

(iv) If any contested issues are severable, the uncontested portions of the settlement may be certified immediately by the presiding officer to the Commission for decision, as provided in paragraph (g) of this section.

APPENDIX L

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. A-751

ARCTIC SLOPE REGIONAL CORPORATION,
Applicant,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*

ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 14, 1988.

/s/ William H. Rehnquist
WILLIAM H. REHNQUIST
Chief Justice of the United States

Dated this 4th day of April, 1988.

(2)

No. 87-1869

Supreme Court, U.S.

FILED

JUL 15 1988

JOSEPH E. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ARCTIC SLOPE REGIONAL CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.,*
Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit**

**BRIEF FOR RESPONDENT STATE OF ALASKA
IN OPPOSITION**

Of Counsel:

GRACE SCHAIBLE
Attorney General
BRUCE BOTELHO
Assistant Attorney General
STATE OF ALASKA
Pouch K
Juneau, Alaska 99811

ROBERT H. LOEFFLER*
W. STEPHEN SMITH
MORRISON & FOERSTER
2000 Pennsylvania Ave., N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1500
*Counsel for Respondent
State of Alaska*

**Counsel of Record*

Dated: July 15, 1988

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1869

ARCTIC SLOPE REGIONAL CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit**

**BRIEF FOR RESPONDENT STATE OF ALASKA
IN OPPOSITION**

As one of the principal protestants of the tariff rates charged by the owners of the Trans Alaska Pipeline System ("TAPS") for transportation of oil through that pipeline, the State of Alaska ("Alaska") was a party to the proceedings below before the Federal Energy Regulatory Commission ("FERC"). And, as a signatory to the June 28, 1985 agreement settling Alaska's protest of TAPS tariff rates ("Settlement Agreement"), Alaska was an intervenor-respondent in the court below.

Section I-3 of the Settlement Agreement provides as follows:

State and TAPS Carriers shall cooperate, each at its own expense, in securing all necessary governmental approvals for this Agreement and in defending against any litigation affecting the validity and enforceability of this Agreement, or any provision thereof.

Alaska believes that the United States Court of Appeals for the District of Columbia Circuit, the FERC, and the TAPS owners have already provided this Court with sufficient information concerning this case. Alaska respectfully requests that the petition for writ of certiorari filed by Arctic Slope Regional Corporation be denied.

Respectfully submitted,

Of Counsel:

GRACE SCHAIBLE
Attorney General
BRUCE BOTELHO
Assistant Attorney General
STATE OF ALASKA
Pouch K
Juneau, Alaska 99811

ROBERT H. LOEFFLER*
W. STEPHEN SMITH
MORRISON & FOERSTER
2000 Pennsylvania Ave., N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1500
*Counsel for Respondent
State of Alaska*

**Counsel of Record*

Dated: July 15, 1988

3

No. 87-1869

Supreme Court, U.S.
FILED
JUL 15 1988

FILED
CLERK OF SUPREME COURT

In the Supreme Court of the United States

OCTOBER TERM, 1988

ARCTIC SLOPE REGIONAL CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF FOR THE FEDERAL ENERGY REGULATORY
COMMISSION IN OPPOSITION**

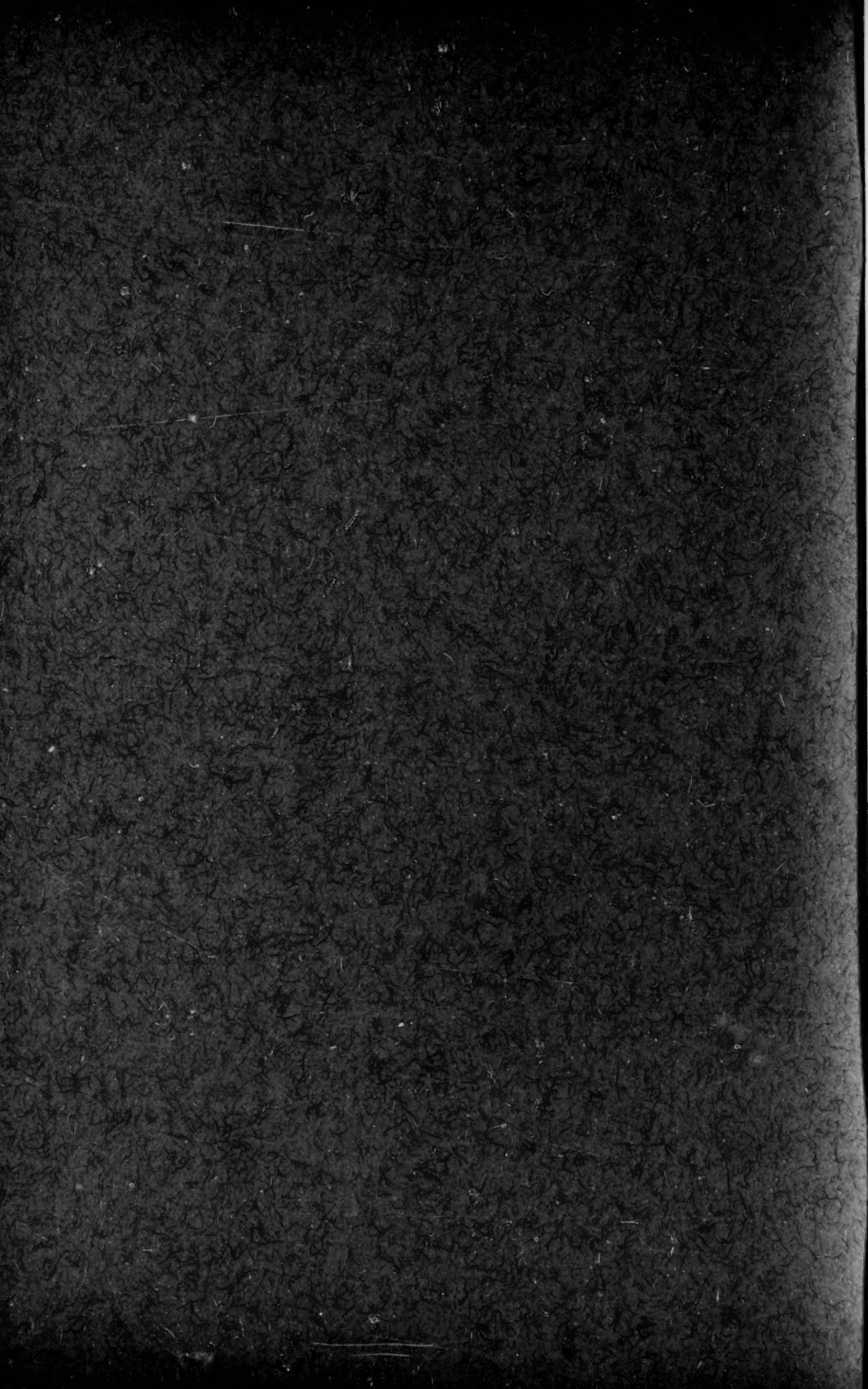
CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CATHERINE C. COOK
General Counsel

JEROME M. FEIT
Solicitor

HANFORD O'HARA
Attorney

Federal Energy Regulatory Commission
Washington, D.C. 20426



QUESTION PRESENTED

Whether the court of appeals properly determined that the Federal Energy Regulatory Commission had acted within its lawful authority in approving as uncontested a settlement of a rate investigation endorsed by all parties except petitioner, where petitioner retained the right to challenge, at a future date, the rates charged under the settlement agreement.

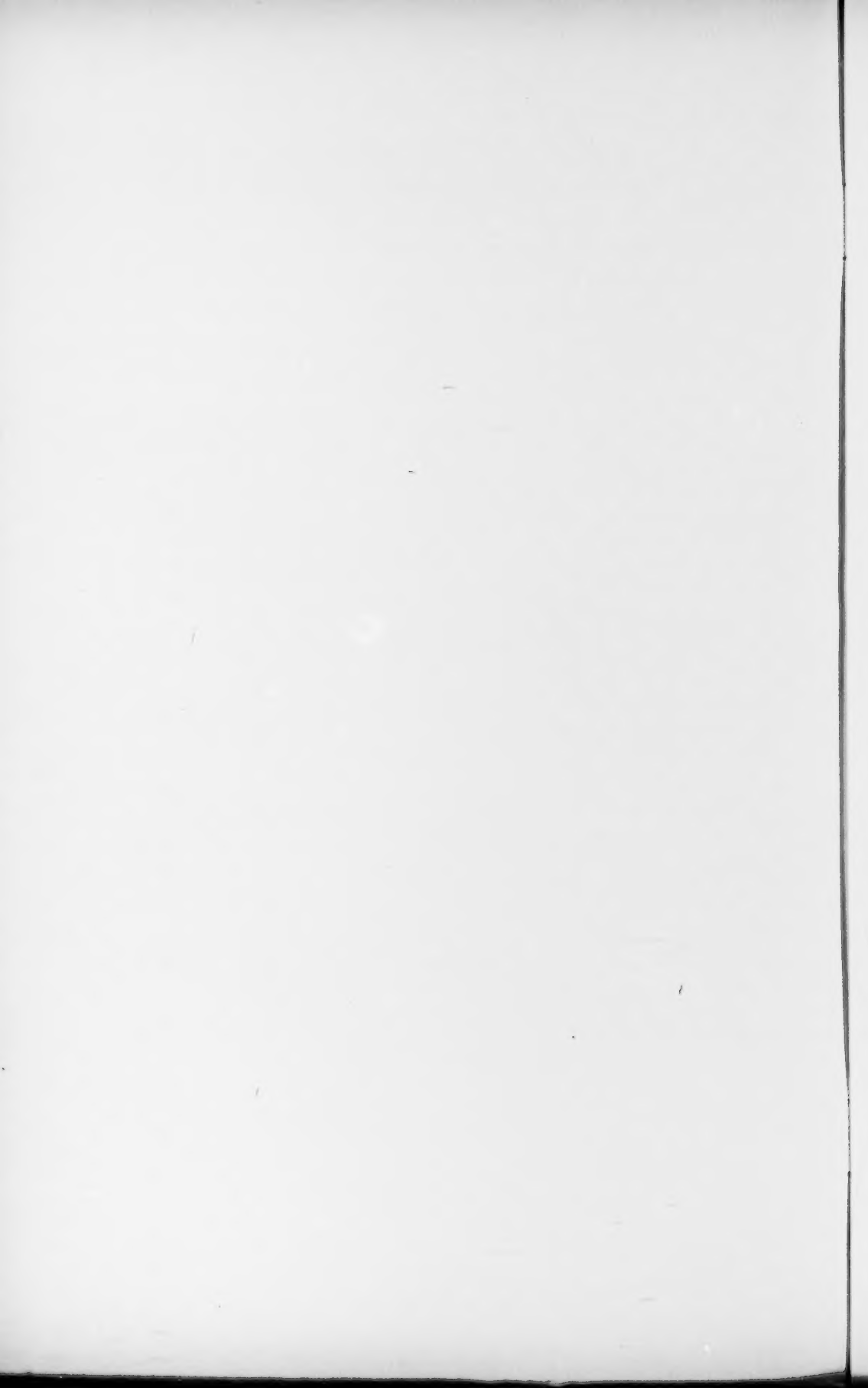


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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1869

ARCTIC SLOPE REGIONAL CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 832 F.2d 158. The order of the Federal Energy Regulatory Commission approving the final settlement (Pet. App. 22a-44a), its order approving the initial settlement (Pet. App. 54a-64a), and its order denying rehearing (Pet. App. 50a-53a) are reported respectively at 35 F.E.R.C. (CCH) ¶ 61,425 (1986), 33 F.E.R.C. (CCH) ¶ 61,064 (1985), and 33 F.E.R.C. (CCH) ¶ 61,392 (1985).

JURISDICTION

The judgment of the court of appeals (Pet. App. 76a-78a) was entered on October 27, 1987. The petition for rehearing and suggestion for rehearing en banc were denied on January 15, 1988 (Pet. App. 79a-80a). On April 4, 1988, the Chief Justice extended the time for filing a

petition for a writ of certiorari to and including May 14, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge to orders issued by the Federal Energy Regulatory Commission (Commission or FERC) approving settlement agreements between the State of Alaska and the owners of the Trans Alaska Pipeline System (TAPS)¹ that resolve extended administrative litigation challenging rates for the transportation of oil through the pipeline.

1. After the discovery of oil reserves on the North Slope of Alaska in 1969, various oil companies constructed an 800-mile pipeline from the North Slope to the all-weather port of Valdez on the Pacific coast of Alaska. As the pipeline was nearing completion in 1977, the TAPS owners filed tariffs with the Interstate Commerce Commission (ICC).² The filed tariffs contained rates for transportation of oil over the 800-mile system ranging from \$6.04 to \$6.44 per barrel. The State of Alaska, the United States Department of Justice, the ICC's Bureau of Investigations and Enforcement, and petitioner Arctic

¹ At the time of the settlements, the TAPS owners were Arco Pipe Line Company, BP Pipelines Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Company, Phillips Alaska Pipeline Corporation, Union Alaska Pipeline Company, Sohio Alaska Pipe Line Company, and Amerada Hess Pipeline Corporation. See Pet. App. 2a n.1.

² Before October 1, 1977, oil pipelines were subject to the jurisdiction of the ICC. On that date, jurisdiction was transferred from the ICC to FERC. See *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 634 n.4 (1978) (*TAPS I*).

Slope Regional Corporation (Arctic) immediately filed protests against the tariffs. Pet. App. 2a-3a.³

Under Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7),⁴ the ICC suspended the tariffs for the maximum seven months and launched an investigation.⁵ The case was ultimately assigned to administrative law judges (ALJs) for hearings of different phases of the matter, a format that FERC retained when it assumed jurisdiction in October 1977. The so-called Phase I proceeding involved the tariffs' ratemaking methodology, including rate base and rate of return; the Phase II proceeding concerned the reasonableness of the TAPS construction costs. Pet. App. 3a-4a.

On February 1, 1980, after lengthy proceedings held over a 13-month period in 1978 and 1979, the ALJ presiding over Phase I issued an initial decision establishing a ratemaking methodology and recommending interim rates substantially below the tariffs filed by the TAPS owners. See 10 F.E.R.C. (CCH) ¶ 63,026 (1980). While this decision was pending before it, the Commission decided *Williams Pipe Line Co.*, 21 F.E.R.C. (CCH) ¶ 61,260 (1982), which addressed the issue of oil pipeline

³ The Court is familiar with this early history of the TAPS litigation. See *TAPS I*, *supra*.

⁴ In October 1978 the Interstate Commerce Act was recodified at 49 U.S.C. 10101 *et seq.* Oil pipelines, however, continue to be regulated under the original Act (49 U.S.C. (1976 ed.) 1 *et seq.*). Unless otherwise specified, citations to the Act refer to the 1976 version. See Pet. App. 4a n.3; Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337.

⁵ The ICC permitted the TAPS owners to file lower interim rates that would remain in effect during the suspension period. This Court upheld the ICC's authority to suspend a pipeline's initial tariff and to set maximum interim rates during the suspension period. *TAPS I*, 436 U.S. at 651-654.

ratemaking methodology. The Commission accordingly remanded the Phase I decision to the ALJ for reconsideration in light of *Williams Pipe Line*. Before the ALJ had an opportunity to conduct remand proceedings, however, the court of appeals reversed *Williams Pipe Line*. *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir.), cert. denied, 469 U.S. 1034 (1984). The ALJ then suspended the Phase I remand proceedings.

In the meantime, the Phase II proceedings were going forward. The presiding ALJs held hearings between February 1982 and December 1984, and set a briefing schedule that would end in January 1986. The ALJs suspended the Phase II proceedings, however, in October 1985, because of a proposed settlement between the State of Alaska and six of the TAPS owners. See Pet. App. 4a.

2. Given the likelihood that the TAPS litigation would continue for a substantial period of time, Alaska and two of the TAPS owners, Arco Pipe Line Company and BP Pipelines Inc., began settlement negotiations. "From this beginning, Alaska and six of the eight [TAPS] owners managed to reach settlement by July 1985" (Pet. App. 4a). By this time, the Antitrust Division of the United States Department of Justice had announced its support of the settlement agreements subject to certain conditions, as had the Commission's staff. See *id.* at 6a, 55a, 71a-72a.⁶ Petitioner, and two TAPS owners, Sohio Alaska Pipe Line Company and Amerada Hess Pipeline Corporation, continued to oppose the settlement. See *id.* at 66a, 71a.

The settlement agreement submitted to the presiding ALJs on June 28, 1985, had two major components. First,

⁶ The Department of Justice signed the "Stipulation and Offer of Settlement" that led to the settlement subject to the Commission's approval (J.A. 1108; "J.A." refers to the joint appendix filed in the court of appeals). The Department of Justice did not sign the separate settlement agreements (J.A. 502; see also Pet. App. 65a-66a).

the settling TAPS owners agreed to pay refunds for the rates charged during the period 1982 to 1985. Second, the agreement established a "rate-setting methodology (the TAPS Settlement Methodology or TSM) until the year 2011, the estimated remaining useful life of the pipeline" (Pet. App. 4a). Under the TSM (*id.* at 5a (footnote omitted)),

rates are set on an annual basis, and are regarded under the regulatory scheme as any other rate filings by a common carrier. Thus, any such rates are subject to challenge by non-settling parties, such as Arctic * * *. [T]he financial impact of [the TSM] is two-fold: (1) to "front-end load" the tariffs charged by the owners in the early, pre-settlement years of the pipeline and (2) to provide for diminishing rates beginning with the initial rates filed under the settlement in December 1985.

See also *id.* at 66a-67a.⁷

3. a. In an order issued October 23, 1985 (Pet. App. 54a-64a), the Commission "approve[d] the settlement agreement with respect to the settling parties because it is fair and reasonable and in the public interest" (*id.* at 60a).⁸ The Commission stated that such settlements "are to be

⁷ The presiding ALJs acknowledged (Pet. App. 66a) that the TSM has two principal consequences. First, it diminishes considerably the signatory carriers' potential obligation to pay refunds to shippers whose oil has been transported through the System during the early years of its operation. Second, it provides for relatively low transportation rates in future years, when decisions about the development *vel non* of marginal oil reserves in northern Alaska will be made.

⁸ The Commission cited *United Municipal Distributors Group v. FERC*, 732 F.2d 202 (D.C. Cir. 1984), as authority for its procedure of severing the contesting parties and approving the settlement with respect to the consenting parties. See Pet. App. 55a n.3.

encouraged [because they] are in the interests of this Commission, the regulated companies, their customers, other parties such as [the State of] Alaska and [the Department of] Justice, and the public * * *” (*ibid.*). The Commission, however, acknowledged the “concerns of the nonsettling parties” and thus remanded the proceedings to the presiding ALJs “to allow the nonsettling parties a hearing only on those issues which apply to them” (*ibid.* (footnote omitted)). The Commission did not address the nonsettling parties’ objections because the Commission was not “imposing the terms of the Settlement Agreement on any nonsettling party” (*id.* at 60a n.17).⁹

In an order issued December 19, 1985 (Pet. App. 50a-53a), the Commission denied Arctic’s request for rehearing. The Commission rejected petitioner’s argument that the procedure adopted by the October 23, 1985, order violated the Commission’s own rules and due process. The Commission reiterated that its “rules permit the severing and approval of uncontested portions of a settlement and the setting of contested portions of the case for hearing”¹⁰ and referred to the “case law uphold[ing] this position” (Pet. App. 52a (footnote omitted); see note 8, *supra*). Petitioner also argued that the remand denied non-settling parties an independent determination of reasonable rates. In rejecting this argument, the Commission made clear

⁹ The Commission also approved provisions of the settlement agreement concerning the allocation of certain costs among the TAPS owners as a pooling agreement under Section 5(1) of the Interstate Commerce Act, 49 U.S.C. 5(1). See Pet. App. 60a-61a.

¹⁰ The Commission relied on Rule 602(h)(1)(iii), 18 C.F.R. 385.602(h)(1)(iii), which provides:

If contested issues are severable, the uncontested portions may be severed and decided in accordance with paragraph (g) of this section.

that petitioner would be “afforded an opportunity to raise its issues at a hearing” (Pet. App. 52a).¹¹

On February 5, 1986, while the case was on remand before the presiding ALJs, Sohio Alaska Pipe Line Company and Amerada Hess Pipeline Corporation agreed to join in the settlement agreement. Accordingly, on March 12, 1986, the State of Alaska proposed that these two TAPS owners be added to the settlement agreement; the Commission’s staff and the Department of Justice supported this proposal. After all parties filed comments and replies, the ALJs, on April 15, 1986, certified the settlement agreement to the Commission. Pet. App. 7a, 24a.

b. On June 27, 1986, the Commission issued its “Order Approving Settlement, Granting Application, Affirming Initial Decision, and Terminating Dockets” (Pet. App. 22a). The Commission severed petitioner from the proceeding under the Commission’s Rule 602(h)(1)(iii)¹², and approved the settlement as uncontested under Rule 602(g).¹³ The Commission rejected petitioner’s

¹¹ Arctic petitioned the court of appeals for review of the Commission’s December 19, 1985, order denying rehearing. The TAPS owners, as intervenors, moved to dismiss on the ground that petitioner lacked standing to contest the settlement. A motions panel of the court of appeals denied the motion to dismiss on July 14, 1986, concluding that petitioner’s contentions “present the requisite injury to make petitioner an aggrieved party” (Pet. App. 21a).

¹² See note 10, *supra*.

¹³ Rule 602(g)(3), 18 C.F.R. 385.602(g)(3), provides:

An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

The Commission also approved the addition of Sohio and Amerada Hess to the settlement agreement and to the pooling arrangement under 49 U.S.C. 5(1). See Pet. App. 43a.

argument that the Commission may not lawfully dismiss its protest. The Commission stated (Pet. App. 37a (footnote omitted; brackets and emphasis in original)):

At present, Arctic neither ships oil through TAPS nor does it have a royalty interest in any oil being shipped via TAPS. It has no direct interest in TAPS' rates. Arctic informs us that it has interests in probable and possible [oil] reserves on the Alaskan North Slope * * * and the oil in which it has a royalty interest will be shipped over TAPS soon. At best, the record indicates this shipment *may* occur in the early to mid-1990's. This contingent, potential future interest is not so present and immediate to justify allowing Arctic to raise this proceeding to the level of a contested settlement.

The Commission made clear that it was not "impos[ing] the settlement on Arctic nor is Arctic bound by [the Commission's] approval of the settlement" (Pet. App. 40a-41a). Moreover, in reiterating the substance of its earlier orders, the Commission emphasized that "[i]f, and when Arctic is actually aggrieved, it may contest TAPS' rates * * * by filing a complaint or protest to a rate filing" (*id.* at 41a (footnote omitted); see *id.* at 26a n.17).

4. The court of appeals (Pet. App. 1a-19a) denied Arctic's petitions for review of the Commission's action, concluding that the Commission had acted within "lawful bounds" (*id.* at 2a) and in furtherance of "substantial public-interest considerations" (*id.* at 10a-11a), by "approving a settlement as in the public interest, while ensuring that Arctic can avail itself of its future remedies when its interest is more fully developed" (*id.* at 19a (footnote omitted)).¹⁴

¹⁴ In the court of appeals, the United States, as a statutory respondent to the petition for review under 28 U.S.C. 2344 and 2348, neither

The court of appeals first rejected petitioner's claim that the Commission approved the settlement in violation of its own rules governing such settlements. The court stated that "this dispute is entirely about a FERC-approved settlement," and that the Commission's actions were within the broad terms of the agency's "quite generous and flexible" settlement rules (Pet. App. 11a). The court thus concluded that those rules, as confirmed by *United Municipal Distributors Group v. FERC*, 732 F.2d 202 (D.C. Cir. 1984) (*United*), permitted the Commission "to sever a contesting party from the proceedings and to treat the matter as uncontested, so long as a forum was provided to resolve the dissenter's challenge" (Pet. App. 11a).

The court of appeals further rebuffed petitioner's contention that the Interstate Commerce Act itself required the Commission "to assure just and reasonable rates" in this proceeding (Pet. App. 11a (footnote omitted)). Noting that Sections 15(7) and 15(1) of the Act, 49 U.S.C. 15(7) and 15(1), "confer broad discretion upon the Commission to structure its proceedings as it sees fit" (Pet. App. 12a), the court concluded that "decisions under the [Act] not to pursue an investigation once begun lie squarely within the agency's discretion * * *" (*id.* at 13a).¹⁵ Moreover, the court held (*id.* at 14a) that

[t]his congressionally granted, judicially confirmed discretion [under the Act], coupled with the general policy favoring settlement of administrative proceedings, * * * lead[s] us to the conclusion that

supported nor opposed the Commission's order under review. See Position of the United States, No. 86-1115.

¹⁵ The court referred to decisions such as *Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979) (initiation of Section 15 investigations), and *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289 (1975) (suspension of challenged rates).

neither the statute nor the agency's corpus of rules requires the Commission under any and all circumstances to prescribe just and reasonable rates whenever a party requests that it do so, even after administrative proceedings have been underway for some considerable time.

Finally, the court of appeals, in upholding the Commission's severing of petitioner from the proceeding, found that petitioner was "for starters, not even a current rate payer [and thus] [i]ts interest is * * * considerably less immediate than that of the ratepayer in *United*" (Pet. App. 16a). And, although concluding that petitioner's allegations of present injury meet "jurisdictional" standing requirements (*id.* at 10a n.10), the court also recognized "Arctic's currently less direct interest in rates than it may well have at some later time" (*id.* at 18a n.21). The court thus held that "it [was] appropriate for the Commission, under the specific circumstances at hand, to serve [Arctic's] interests by not forcing the settlement upon Arctic and by preserving possible future challenges for a ripper moment" (*id.* at 17a (footnote omitted)).

ARGUMENT

In upholding the Commission's order in this case, the court of appeals left standing as "fair and reasonable [a] settlement as to all those who have the most direct and immediate interest in these long-lived proceedings" (Pet. App. 17a). This settlement, as the court of appeals acknowledged (*id.* at 18a-19a), established a predictable and declining ceiling for TAPS oil rates for a substantial period of time and also resolved long years of dispute over refunds for the period before the rates went into effect. Moreover, the court approved, "under the specific circumstances at hand," the Commission's conclusion that

Arctic, as the only party opposing settlement, has the right to challenge the settlement but that such challenge should be brought at "a riper moment," namely, when Arctic's interests became more direct and definite (*id.* at 17a).

The court of appeals' decision, which reflects a careful balance of competing interests, is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, although the settlement agreement is economically significant and beneficial to the public interest, the agreement itself is unique and its approval is therefore not likely to be of any continuing legal importance. Indeed, as the court of appeals pointed out, "[t]he very uniqueness of the proceeding and the subsequent settlement render[ed] the Commission's action more readily understandable and defensible" (Pet. App. 16a). For all these reasons, further review by this Court is not warranted.

1. Petitioner contends (Pet. 15-17) that the court of appeals violated the rule of *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), in approving the Commission's action on a basis that the Commission itself had rejected. In petitioner's view, the Commission "had dismissed Arctic from the proceeding for lack of standing" (Pet. 16); the court of appeals rejected that "ruling" and "upheld the agency's order as a proper exercise of administrative 'discretion' " (*ibid.*). This contention, however, misperceives the rulings of both the court of appeals and the Commission and provides no basis for disturbing the decision below.

The Commission, adhering to a ruling in another proceeding,¹⁶ concluded that a party may not "automatically create a genuine, material issue [of fact] in a settlement

¹⁶ See *El Paso Natural Gas Co.*, 25 F.E.R.C. (CCH) ¶ 61,292 (1983); Pet. App. 36a n.39.

merely by its opposition to the settlement" (Pet. App. 36a). Instead, when all other parties accept a settlement, the non-settling party's interests must be " 'immediately and irreparably affected by approval of a settlement' " (*ibid.* (emphasis in original; citation omitted)) in order "to raise [the] proceeding to the level of a contested settlement" (*id.* at 37a). The Commission analogized this standard to that which "courts have fashioned * * * to determine judicial standing" (*id.* at 36a).¹⁷ The Commission, analyzing the "specific facts" of the case, determined that Arctic was not "particularly 'aggrieved' by the settlement" but could assert only contingent and potential harm (*ibid.*). Accordingly, the Commission postponed an evaluation of petitioner's challenge to the settlement to such time as petitioner could show a more immediate and direct impact. See *id.* at 37a-40a.

To be sure, the court of appeals rejected, in response to the TAPS owners' argument that petitioner lacked standing to challenge the settlement,¹⁸ any suggestion in the Commission's order that Arctic did not allege "a sufficient present injury to satisfy jurisdictional [standing] prerequisites" (Pet. App. 10a n.10). At the same time, however, the court of appeals made clear that it accepted the Commission's view of its own discretion to conclude the proceedings for the reasons articulated by the Commission. See *id.* at 19a.

¹⁷ The Commission described that judicial "test" as "whether a party 'has sustained an injury *in fact* to an interest arguably within the zone of interests protected or regulated by the [Interstate Commerce Act]' " (Pet. App. 36a (brackets and emphasis in original; footnote omitted)).

¹⁸ In the court of appeals, the Commission did not assert that Arctic lacked standing to file its challenge. The Commission contended only that Arctic's attenuated interest offered no basis for "upset[ing] a settlement otherwise clearly in the public interest" (FERC Br. 25).

A fair and careful reading of the court of appeals' opinion, in light of the Commission's order, belies any claim that the court decided the case on a ground that the Commission itself had not adopted. On the contrary, the court of appeals fully agreed with the Commission's critical finding that approval of the settlement would not so immediately and irreparably affect Arctic's interests to warrant that its challenge should go forward. The court of appeals also accepted the Commission's ultimate conclusion that terminating the proceedings was appropriate and within the bounds of its discretion under the pertinent statutes and regulations. See Pet. App. 17a-19a; cf. *Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486, 526 n.14 (1968).

Petitioner seeks to treat the Commission's ruling as an inflexible jurisdictional holding that cannot be characterized as an exercise of discretion. That treatment, however, is unjustified. Whether phrased in terms of "aggravement," "ripeness," or "prematurity," the focus of the Commission's decision, far from being a rigid jurisdictional ruling, reflects a balancing of competing interests in order to determine the proper course under the circumstances. In affirming this determination, the court of appeals concluded that the Commission had acted "appropriate[ly] * * * under the specific circumstances at hand" (Pet. App. 17a). Contrary to petitioner's claim, the court of appeals did not "invent[] a theory that [the Commission] has never suggested or adopted" (Pet. 14).

2. Petitioner also contends (Pet. 20-23) that the court of appeals failed to treat the case as a complaint under Section 13(1) of the Interstate Commerce Act, 49 U.S.C. 13(1), and thus erred in not requiring the Commission to resolve Arctic's challenge to the TAPS rates. As the court of appeals made clear (Pet. App. 12a n.13), however, the

filing of a complaint under Section 13(1) had not prompted the Commission's proceeding.¹⁹ Rather, the Commission initiated the proceedings on its own motion under Section 15(7) in response to the TAPS owners' filing of new rates. The court of appeals adhered (Pet. App. 12a-13a) to this Court's decisions holding that an agency's discretion under Section 15 proceedings is broad and, in some instances, unreviewable. See, e.g., *Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979); *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658 (1963). The court thus correctly concluded that "decisions under the [Interstate Commerce Act] not to pursue an investigation once begun lie squarely within the agency's discretion, even if the initial investigation reveals that some rates, though not all, are illegal" (Pet. App. 13a, citing *United States v. Louisiana*, 290 U.S. 70 (1933)).

Petitioner attempts to blunt the force of this straightforward reasoning by erroneously assuming that the case, however initiated, must be treated as having arisen under Section 13(1). The fact remains that the case began as an investigation under Section 15(7), not as a formal complaint under Section 13(1), and that the court of appeals' analysis of the applicable scope of the Commission's discretion in this matter followed settled law. Moreover, petitioner's unfounded assumption would lead to the unprecedented conclusion that the remedies of Section 13(1) automatically apply whenever a private party files a protest against a rate subject to the Commission's jurisdiction under Section 15(7). In *Southern Ry. v. Seaboard Allied*

¹⁹ The court of appeals stated that petitioner "has advanced no reason to persuade us that section 13 was ever involved in this case" (Pet. App. 12a n.13).

Milling Corp., 442 U.S. at 463 (emphases in original),²⁰ however, this Court has already made clear that remedies under Sections 15(7) and 13(1) are independent of each other:

[I]t is * * * clear that [the Section 13(1)] remedy is independent of § 15(8)(a) proceedings. First, the language of § 15(8)(a) suggests no linkage to § 13(1) * * *. Second, § 13(1) has been an independent and self-contained procedure since the Act was first passed in 1887. When § 15(8)(a) was added some 23 years later, there was no indication that it was intended as an *amendment to § 13(1)*, rather than as a limited pre-effective and Commission-initiated *alternative* to the posteffective and shipper-initiated procedures in § 13(1).

Indeed, acceptance of petitioner's ill-founded premise would require this Court to repudiate the line of decisions holding that an agency exercises considerable discretion under Section 15(7). See, e.g., *Southern Ry. v. Seaboard Allied Milling Corp.*, *supra*; *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658 (1963).²¹ Petitioner offers no sound basis for the Court to take this step.

²⁰ Section 15(8)(a), currently codified at 49 U.S.C. 10707, was enacted by Congress as part of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 203(e), 90 Stat. 36, to replace Section 15(7) as it applied to railroads. Section 15(8)(a) is the same as Section 15(7) in all respects material to the present discussion.

²¹ Petitioner errs in relying (Pet. 24) on *City of Chicago v. United States*, 396 U.S. 162 (1969), and *Minneapolis Gas Co. v. FPC*, 294 F.2d 212 (D.C. Cir. 1961). Petitioner claims that those decisions show that the duration and course of the proceedings themselves obligated the Commission to adjudicate the lawfulness of the TAPS rates. In *City of Chicago*, however, the ICC's decision resulted in the immediate grant of the relief requested. Here, the initial rates that caused the Commission's investigation under Section 15 have been replaced

3. Petitioner further argues (Pet. 17-20) that the Due Process Clause prohibits "dismiss[ing] [petitioner,] an aggrieved party[,] from a proceeding that directly affects its interests, without ruling on the merits of its claim" (Pet. 18). This claim is both overstated and erroneous. To be sure, the court of appeals did hold that petitioner had standing to maintain this action. See Pet. App. 10a n.10. Petitioner, however, conveniently elevates this ruling into a constitutional prohibition against the Commission's chosen method of resolving the case. This sleight of hand cannot succeed because, as this Court has consistently recognized, "[t]he constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances." *Landon v. Plasencia*, 459 U.S. 21, 34 (1982).

The court of appeals noted that "Arctic's interest in TAPS tariffs stems from its ongoing negotiation of exploration leases and the level of bonus and royalty payments it may achieve, sources of compensation that are potentially affected by transportation costs in bringing oil via TAPS to market" (Pet. App. 3a; see *id.* at 10a n.10). The court, however, weighed this interest against other crucial facts in approving the Commission's decision to require Arctic to initiate a further complaint or protest if it wishes to challenge the TAPS rates filed under the settlement. First, the court found that the settlement's impact on Arctic, "though assuredly real," is also "indirect" (*id.* at 18a n.20). This distinction is not semantic. Arctic's current interest in the TAPS rates has not led it to file a complaint or protest against the rates promulgated under the

by the TAPS settlement. Similarly, in *Minneapolis Gas Co.*, the Commission's refusal to act effectively left in place rates deemed to have been just and reasonable. In the instant case, however, the Commission made clear that its settlement approval does not establish that the rates are just and reasonable. See Pet. App. 14a n.16.

settlement. And, as all parties agree, Arctic cannot expect to ship oil, if at all, before the mid-1990s.

Second, the court of appeals recognized that, given Arctic's current attenuated as compared to more direct future interest in TAPS rates, the Commission quite properly could provide Arctic "with a meaningful remedy contemplated by the statute" (Pet. App. 18a n.21), while choosing to approve the settlement in the public interest and deferring petitioner's challenge to a future proceeding. This procedural solution to a complicated administrative problem, namely, balancing the immediately pressing interests of other diverse parties involved in complex and protracted litigation while preserving Arctic's right to challenge future TAPS rates when its interest becomes more concrete, comports with the Due Process Clause by ensuring petitioner "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

4. Finally, petitioner contends (Pet. 24-28) that the Commission's action in severing petitioner and approving as uncontested the settlement agreement violated the Commission's own rules. The court of appeals, following its earlier decision in *United*, 732 F.2d at 209, construed the Commission's rules as permitting the severance of a non-settling party in order to enable the settlement to proceed on an uncontested basis (Pet. App. 11a). And, as in *United*, petitioner, as the non-settling party, "was afforded a further procedural remedy (consistent with the statute and the Commission's rules) to challenge the rates it was being charged" (*id.* at. 8a).

Nevertheless, petitioner cites its "aggrieved" status as requiring the Commission to treat the settlement as contested and thus afford Arctic an immediate hearing. Petitioner's attempt to twist the meaning of the Commission's

rules must fail because, at bottom, petitioner seeks to make mandatory what the rules leave discretionary. Rule 602(h)(1)(i), 18 C.F.R. 385.602(h)(1)(i), for example, states that "the Commission may decide the merits of the contested settlement issues"; Rule 602(h)(1)(ii)(B), 18 C.F.R. 385.602(h)(1)(ii)(B), similarly provides that when confronted with a contesting party to a settlement, the Commission may take such "action which the Commission determines to be appropriate." As the court of appeals correctly observed, "[t]he breadth of discretion trumpeted by that provision is manifest" (Pet. App. 11a).²² In the circumstances presented, the Commission's action fell well within its settled discretionary practice under its rules.

²² Hence, petitioner errs in relying (Pet. 28-30) on decisions such as *New Orleans Public Service v. FERC*, 659 F.2d 509 (5th Cir. 1981), as creating a conflict with the court of appeals' decision. Because the Commission exercises considerable discretion in its approval of settlement agreements, decisions such as *New Orleans Public Service*, which hold that the Commission can treat its approval of a contested settlement as a resolution of the merits, are entirely consistent with the decision here.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General

CATHERINE C. COOK
General Counsel

JEROME M. FEIT
Solicitor

HANFORD O'HARA
Attorney
Federal Energy Regulatory Commission

JULY 1988

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No. 87-1869

In the Supreme Court of the United States

OCTOBER TERM, 1988

ARCTIC SLOPE REGIONAL CORPORATION,
Petitioner

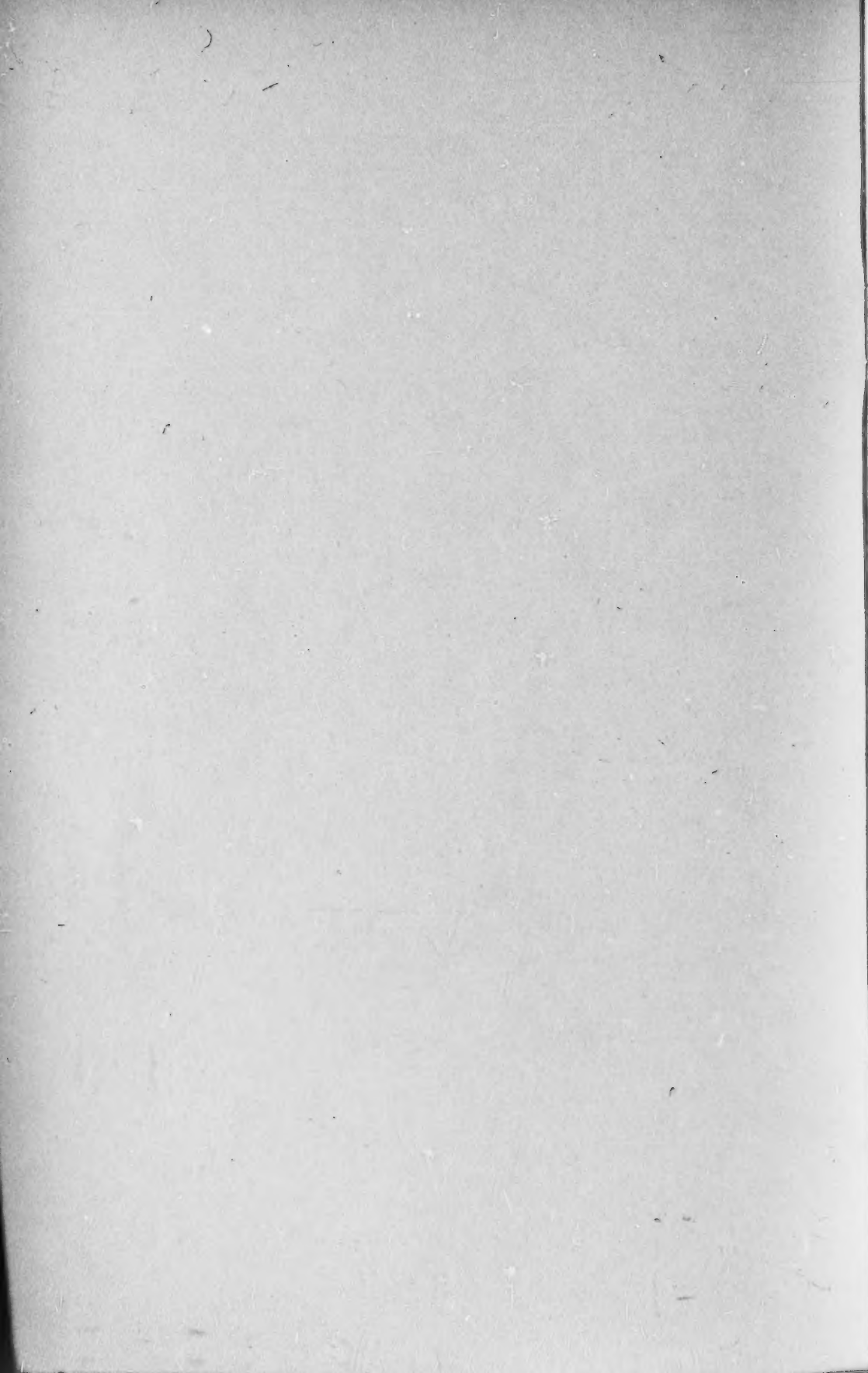
v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF FOR THE
ALASKA FEDERATION OF NATIVES
AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

DONALD CRAIG MITCHELL
1552 Orca Street
Anchorage, Alaska 99501
(907) 276-1681
Counsel for Amicus Curiae



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**MOTION FOR LEAVE TO FILE BRIEF FOR THE
ALASKA FEDERATION OF NATIVES
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

Pursuant to Rule 36 of the Rules of this Court, the Alaska Federation of Natives ("AFN") requests leave to file the accompanying brief as amicus curiae in support of petitioner. The attorneys for petitioner have consented to the filing of this brief. Consent has not been received from the attorneys for respondents.

The AFN is a non-profit corporation incorporated under the laws of the State of Alaska. The AFN represents all Alaska Natives and served as their advocate during the passage of the Alaska Native Claims Settle-

ment Act, 43 U.S.C. §§ 1601 *et seq.* ("ANCSA"). The outcome of this litigation will have a direct effect on all Alaska Natives represented by the AFN.

Respectfully submitted.

DONALD CRAIG MITCHELL
1552 Orca Street
Anchorage, Alaska 99501
(907) 276-1681
Counsel for Amicus Curiae

JULY 1988

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BRIEF OF THE ALASKA FEDERATION OF NATIVES
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Alaska Federation of Natives ("AFN") is a non-profit corporation incorporated under the laws of the State of Alaska. The AFN represents all Alaska Natives and served as their advocate during the passage of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* ("ANCSA"). Because the decision below directly harms the economic interests of all Alaska Natives, the AFN urges that the Court grant review.

SUMMARY OF ARGUMENT

The unprecedented decision below inflicts irreparable injury on the Alaska Natives and interferes with the comprehensive settlement of Alaska Native Claims enacted by Congress. The court below departed from consistent administrative and judicial precedent by denying Arctic the right to a hearing to determine the legality of Trans Alaska Pipeline System ("TAPS") rates. The court authorized the Federal Energy Regulatory Commission ("FERC") to dismiss Arctic's complaint despite Arctic's admitted present injury. The Interstate Commerce Act, however, provides only prospective relief for injuries to non-shippers. Therefore, postponement of Arctic's right to a remedy denies it *any* relief from its present injury. The decision below frustrates major remedial provisions of the Interstate Commerce Act and impairs the interests of other Regional Corporations involved in the Alaska oil industry.

ARGUMENT

THE DECISION BELOW WARRANTS REVIEW BECAUSE IT IS IN CONFLICT WITH SETTLED LAW AND INFLECTS IRREPARABLE INJURY ON ALL ALASKA NATIVES.

I. THE DECISION BELOW INFLECTS IRREPARABLE INJURY ON ARCTIC AND ALL ALASKA NATIVES.

By denying petitioner Arctic the right to seek lawful TAPS rates, the decision below injures economic rights of Alaska Natives that are at the heart of the Alaska Native Claims Settlement Act. With ANCSA, Congress made grants to the Alaska Natives of cash and lands as "compensation for the extinguishment of [aboriginal] claims to [Alaskan] land." 43 U.S.C. § 1626(a). The land grants were intended to serve "as a form of capital for economic development," H.R. Rep. No. 523, 92d Cong., 1st Sess. 5 (1971), and Congress recognized that most

land selected by the Natives pursuant to ANCSA "[would] be selected for its economic potential." *Id.*

Arctic is one of thirteen Regional Corporations established to administer the ANCSA grants and owns some 4.5 million acres of land on the Alaska North Slope which contain proven, probable and possible oil reserves. High TAPS rates directly reduce the value of these lands and the income that they generate. See *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 635 n.6 (1978) ("*TAPS I*").

All Alaska Natives share in the injury caused Arctic by excessive TAPS rates. Congress intended "that all Natives may benefit equally from any minerals discovered within a particular region," H.R. Rep. No. 523, 92d Cong., 1st Sess. 6 (1971), and pursuant to 43 U.S.C. § 1606(i), "[s]eventy per centum of all revenues received by [Arctic] from . . . subsurface estate patented to it pursuant to [ANCSA] shall be divided annually by [Arctic] among all twelve Regional Corporations . . . according to the number of Natives enrolled in each region" By statute, revenues received by the Regional Corporations are distributed among the approximately two hundred Village Corporations and eighty thousand Native shareholders to ameliorate "the extreme poverty and underprivileged status of the Natives generally" and to provide "adequate resources to permit the Natives to help themselves economically." H.R. Rep. No. 523, 92d Cong., 1st Sess. 5-6 (1971). See 43 U.S.C. § 1606(j). Alaska Natives lose current revenue because of the decision below: Their share of revenue from Arctic's lands is diminished, and their own efforts to develop Alaska oil are endangered. As has Arctic, other Regional Corporations will have direct interests in TAPS rates before they will become shippers. The decision below is precedent that they cannot challenge excessive TAPS rates that injure them.

The court of appeals acknowledged that Arctic is harmed if TAPS rates are excessive, Pet. App. at 10a n.10, and found that the impact of TAPS rates on Arctic's current interests was "assuredly real." *Id.* at 18a n.20. Nonetheless, the court concluded that FERC could refuse to provide Arctic a hearing on the merits until "the impact of TAPS rates upon it is more concrete and substantial," *id.* at 19a, and found it "appropriate" that FERC "preserv[e Arctic's] possible future challenges for a riper moment." *Id.* at 17a.

The court's decision ignored the realities of TAPS economics. Alaska almost certainly contains the largest remaining American petroleum reserves, and oil companies today are exploring the Alaska North Slope to determine the location and the extent of those reserves. Bidders for North Slope leases seek the right to explore and to develop what oil reserves they find: If tracts appear likely to produce oil in quantity and at a profit, they will pay substantial bonuses to enter leases and agree to substantial rental payments for leasing sufficient surface estate to allow drilling and exploration.

TAPS charges directly diminish profitability and the amounts Arctic can get for its leases. Unless a potential bidder is a parent or affiliate of a TAPS owner, every dollar that must be paid to transport a barrel of oil to market through TAPS must be subtracted from the profit that can be made on that barrel of oil. See *TAPS I*, 436 U.S. at 635 n.6. Moreover, TAPS rates are vastly higher than those of other domestic oil pipelines. See *Trans Alaska Pipeline System*, 21 F.E.R.C. (CCH) ¶ 61,092 at 61,285 (1982). They therefore constitute a major portion of a producer's costs and have a profound impact on the profitability of oil recovery.

As Arctic demonstrates, see Pet. at 4-5, high TAPS rates reduce the current income from its lands, and can render unprofitable some fields that would be productive

if their oil could be shipped to market at reasonable rates. If TAPS rates are excessive, Arctic will receive less for its rights regardless of whether oil ultimately is produced or not.

Arctic is the party most grievously injured by high TAPS rates and the only party realistically likely to challenge those rates. The major shippers of North Slope oil are parent companies of the TAPS owners, and so they recover excessive TAPS charges through the high profits of their subsidiaries. *See TAPS I*, 436 U.S. at 644. The large oil companies simply have no interest in low TAPS rates, because the weight of such rates falls on independent producers and the public:

[N]o shipper of oil protested the TAPS rates. Instead, as one might predict from experience under the Hepburn Act . . . , only the public perceives that it will be injured by the proposed TAPS rates and has objected to them. . . . Therefore, in the absence of suspension authority, unreasonable initial rates—both generally and in these cases—like unreasonable increases in existing rates, will almost certainly be passed along to “a prior producer or . . . to the ultimate consumer.”

Id. (citation omitted). The Natives must rely on their own efforts or FERC's initiative for protection against unlawful rates. But FERC has strenuously avoided addressing the legality of TAPS rates, and the decision of the court of appeals blocks the Natives' own efforts to assert their rights. By holding that the possibility of future relief was an adequate remedy for Arctic's injury, the court below condemned Arctic—and all Alaska Natives—to irreparable injury.

II. THE DECISION BELOW SHOULD BE REVIEWED BECAUSE IT ENDANGERS THE RIGHTS OF ALL NON-SHIPPIERS TO INTERSTATE COMMERCE ACT REMEDIES.

The settlement approved by FERC and the court below addressed the private concerns of the settling litigants, but did not fulfill the "Commission's essential task . . . to establish and maintain reasonable charges and proper rate relationships." *United States v. Chesapeake & Ohio Ry. Co.*, 426 U.S. 500, 513 (1976) ("*Chessie*") (quoting 1 I. Sharfman, *The Interstate Commerce Commission* 59 (1931)). Its terms were shaped by the fact that Alaska, entitled to royalties on oil already shipped, had a strong claim for refunds.¹ The settlement ignored Arctic's interests, those of the Alaska Natives, and those of all non-shippers. FERC dismissed Arctic's complaint solely on the erroneous ground that Arctic was not aggrieved. When the court of appeals affirmed FERC despite rejecting that rationale, it created unprecedented doctrine inconsistent with the remedial scheme established by the Interstate Commerce Act.

The AFN joins Arctic in its position that the decision below was inconsistent with the Interstate Commerce Act, FERC regulations, and the Due Process Clause. The decision resulted in an unlawful denial of an aggrieved party's right to a hearing on the legality of rates.

The court of appeals authorized FERC to consider the extent—rather than the existence—of an aggrieved

¹ Alaska agreed not to challenge rates generated by a methodology that established rates far higher than those generated by the methodology established by the Initial Decision in the administrative proceedings. See *Trans Alaska Pipeline System*, 10 F.E.R.C. (CCH) ¶ 63,026 (1980). It agreed that three quarters of the contested cost of construction would be allowed in the rate base, and that the owners could recover the remaining quarter through depreciation. In return, Alaska received several hundred million dollars for *past* overcharges and some thirty-five million dollars as reimbursement for its litigation expenses.

party's injury, *see* Pet. App. at 10a n.10, and then encouraged FERC to trivialize Arctic's injuries by comparing them to those suffered by shippers. *See id.* at 16a ("Here, Arctic is, for starters, not even a current rate payer"); *id.* at 19a (impact of TAPS settlement on Arctic was less severe and direct than on a shipper). The court thus gutted the remedial scheme established by the Interstate Commerce Act: The Act grants an aggrieved party the right to a hearing, but the decision below denies that right and substitutes dependence on administrative discretion.

The Interstate Commerce Act has never limited its remedial provisions to shippers. Section 13 of the original Act, containing the standing provisions for proceedings before the Interstate Commerce Commission, authorized "any person" to file a complaint with the Commission, *see* 49 U.S.C. § 13(1), and provided that no complaint could be dismissed "because of the absence of direct damage to the complainant." 49 U.S.C. § 13(2). *See also ICC v. Baird*, 194 U.S. 25, 39 (1904).

Non-shippers are harmed until an excessive rate is declared unlawful, and their injuries cannot be remedied by reparations. Congress authorized the prescription of maximum rates and the suspension of proposed rates, *see TAPS I*, 436 U.S. at 639-42, "to protect the public from the irreparable harm resulting in unjustified increases in transportation costs. . . ." *Chessie*, 426 U.S. at 513.² The Act thus supplements its damages remedy for shippers, *see* 49 U.S.C. § 16(1), with enhanced prospective relief to protect the broader class of persons who suffer if rates are excessive.

² At the same time Congress enlarged the Commission's authority, it extended coverage of the Act to oil pipelines. *See Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1504 (D.C. Cir.), *cert. denied*, 469 U.S. 1034 (1984).

The decision below is at loggerheads with the evident purpose of the Act. The decision withholds the right to prospective relief from non-shippers—the very class which must have prospective relief to have any remedy at all—and grants it only to shippers—the one class which can gain at least some relief through damages.

CONCLUSION

The Alaska Federation of Natives urges the Court to grant certiorari and reverse the decision below.

Respectfully submitted.

DONALD CRAIG MITCHELL
1552 Orca Street
Anchorage, Alaska 99501
(907) 276-1681
Counsel for Amicus Curiae

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ARCTIC SLOPE REGIONAL CORPORATION,
Petitioner
v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF IN OPPOSITION OF RESPONDENT
OWNERS OF THE TRANS ALASKA
PIPELINE SYSTEM**

RICHARD J. FLYNN, P.C.*
EUGENE R. ELROD
KEVIN HAWLEY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
*Attorneys for the Owners
of the Trans Alaska
Pipeline System*

* Counsel of Record
July 16, 1988

(Additional Attorneys Listed on Inside Cover)

DAVID T. ANDRIL
VINSON & ELKINS
1455 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20004

Of Counsel:

PAUL S. BILGORE
P.O. Box 22617
Long Beach, CA 90801-5619

Of Counsel:

THOMAS F. LEMONS, JR.
P.O. Box 2220
Houston, TX 77252-2180

Of Counsel:

JAMES R. KINZER
P.O. Box 900
Dallas, TX 75221

Of Counsel:

GLENN E. DAVIS
1291 Adams Building
Bartlesville, OK 74004

ALBERT S. TABOR, JR.
JOHN E. KENNEDY
VINSON & ELKINS
First City Tower
Houston, TX 77002-6760
*Attorneys for Amerada Hess
Pipeline Corporation*

ROBERT E. JORDAN III
STEVEN H. BROSE
TIMOTHY M. WALSH
STEVEN REED
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
*Attorneys for ARCO Pipe
Line Company*

RICHARD J. FLYNN, P.C.
EUGENE R. ELROD
KEVIN HAWLEY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
*Attorneys for Exxon
Pipeline Company*

JOHN P. DEAN
DONOVAN LEISURE NEWTON
& IRVINE
1850 K Street, N.W.
Suite 1200
Washington, D.C. 20006
*Attorneys for Mobil Alaska
Pipeline Company*

RAYMOND N. SHIBLEY
BRIAN D. O'NEILL
LEBOEUF, LAMB, LEIBY &
MACRAE
Suite 1100
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
*Attorneys for Phillips Alaska
Pipeline Corporation*

Of Counsel:

ROBERT A. JOHNSON
FREDERICK G. WOHLSCHLAEGER
39-B-5300
200 Public Square
Cleveland, OH 44114-2375

Of Counsel:

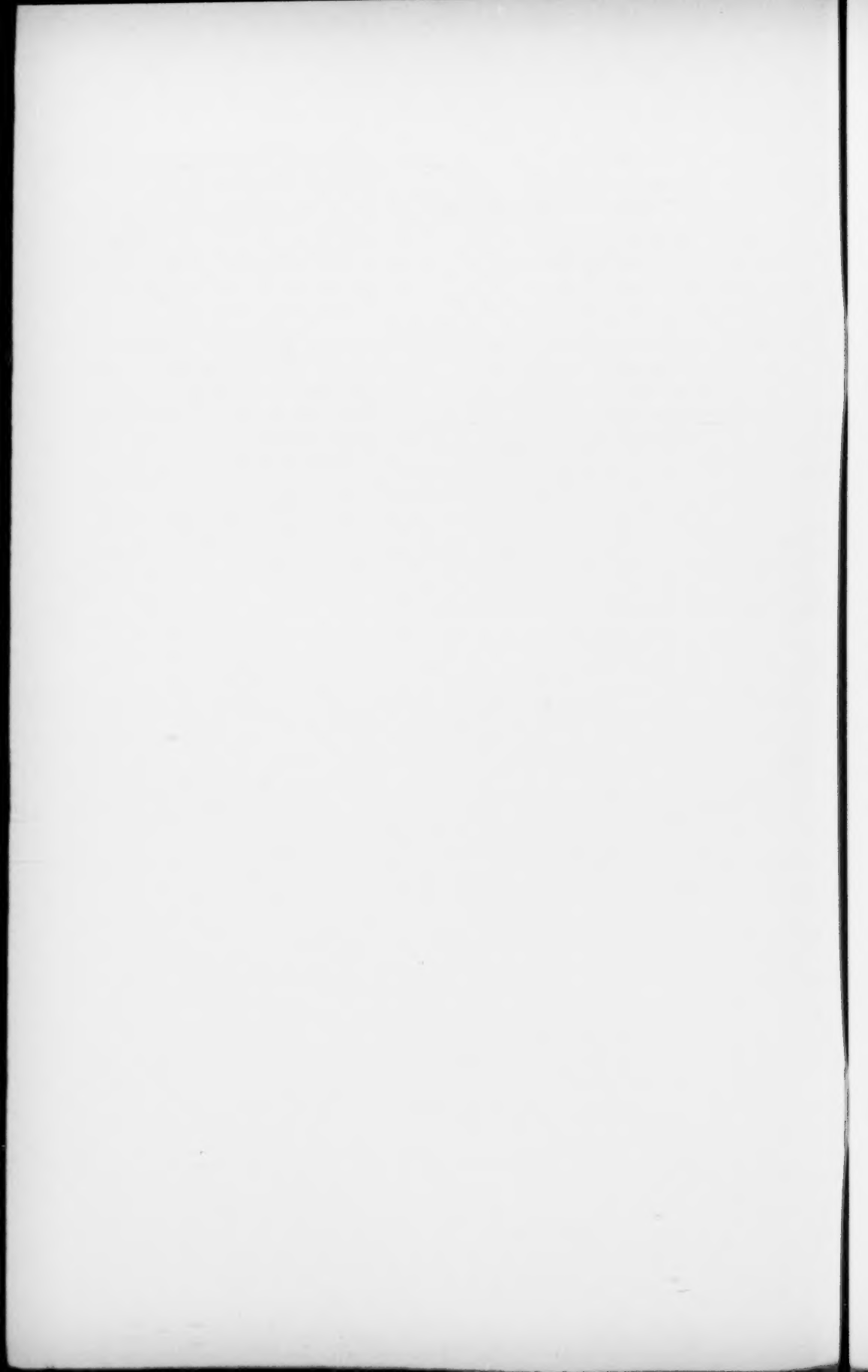
ANTHONY G. MELAS
461 S. Boylston
Room 1133
Los Angeles, CA 90017

PHILLIP R. EHRENKRANZ
KEITH R. MCCREA
PAUL F. FORSHAY
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004

*Attorneys for Sohio Alaska
Pipe Line Company*

PATRICK M. RAHER
HOGAN & HARTSON
555 13th Street, N.W.
Washington, D.C. 20004

*Attorneys for Unocal
Pipeline Company*



QUESTIONS PRESENTED

1. Did the Federal Energy Regulatory Commission violate the Interstate Commerce Act, the due process clause of the Fifth Amendment, or its own regulations in approving a settlement of a rate investigation and terminating that investigation, while preserving the right of non-settling parties to initiate an action against the rates charged under the settlement?

2. Did the court of appeals violate this Court's rule in *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947) in upholding the Federal Energy Regulatory Commission's approval of that settlement?

RULE 28.1 DISCLOSURE

Pursuant to Supreme Court Rule 28.1, a listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of respondents appears in the respondent's appendix at pp. 1a-2a.

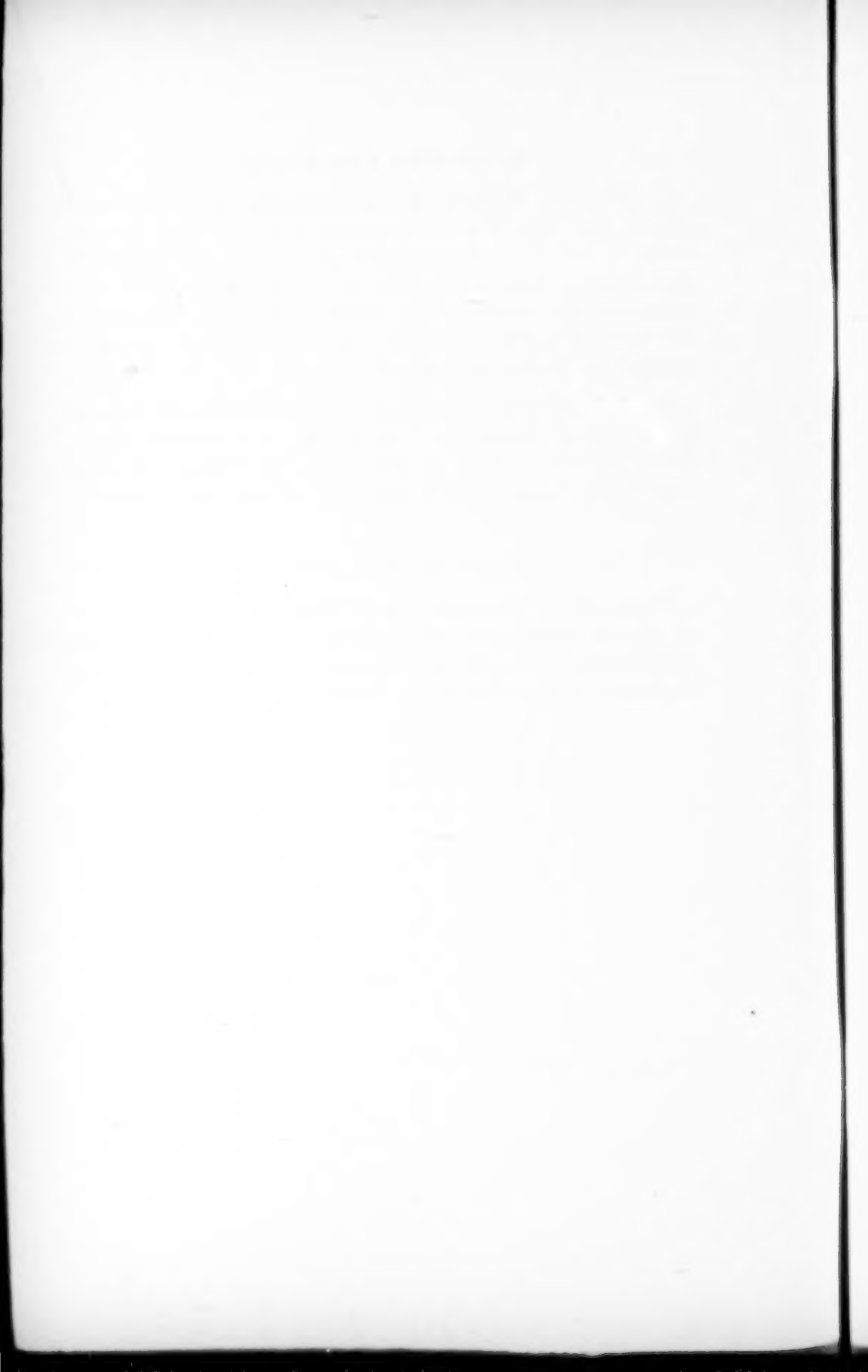


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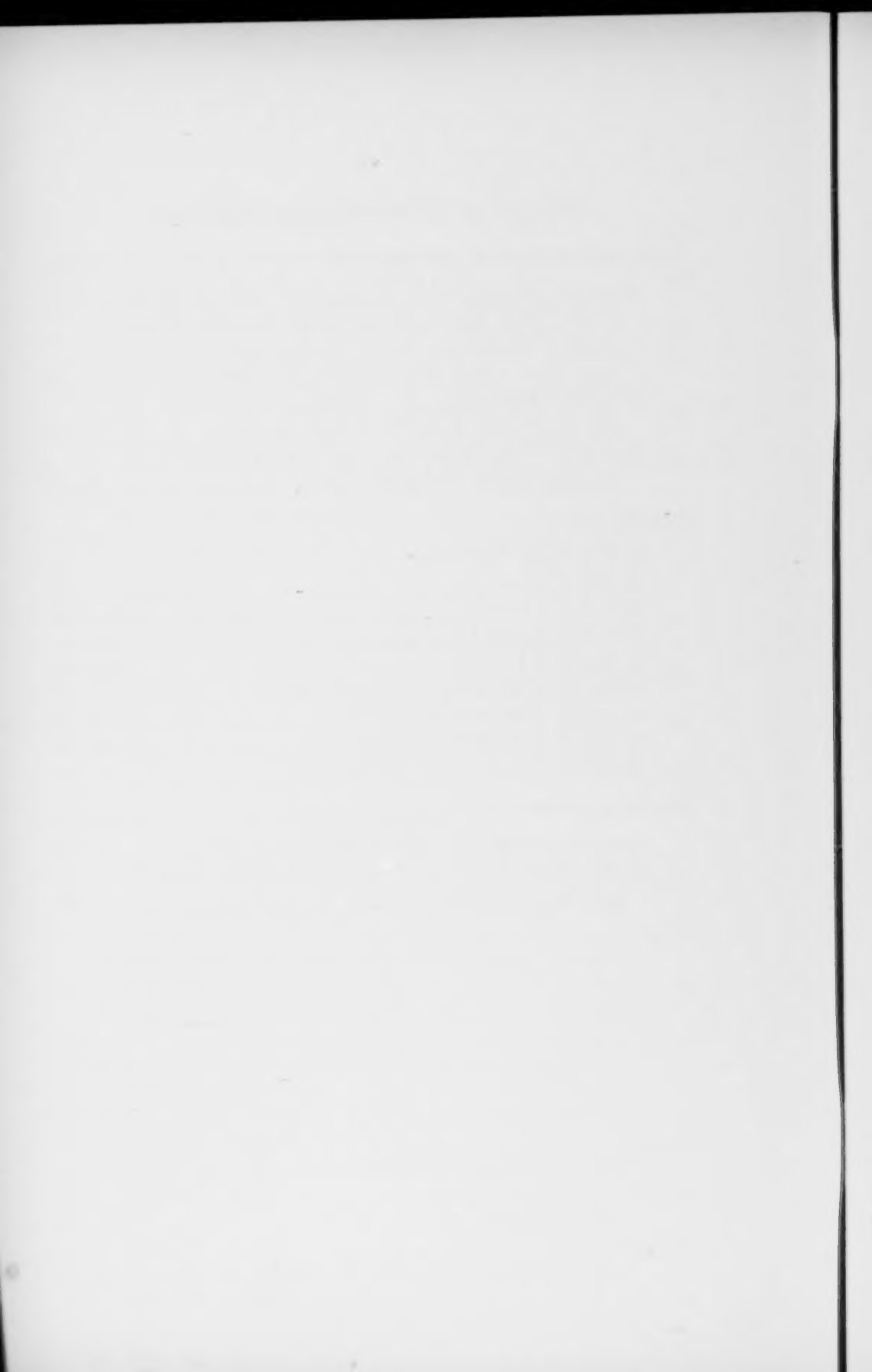
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1869

ARCTIC SLOPE REGIONAL CORPORATION,
v. *Petitioner*

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF IN OPPOSITION OF RESPONDENT
OWNERS OF THE TRANS ALASKA
PIPELINE SYSTEM**

The owners of the Trans Alaska Pipeline System ("TAPS"),¹ respondents in the above captioned case, respectfully request that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, which is reported at 832 F.2d 158 (Petitioner's Appendix at 1a-19a).²

¹ The seven TAPS owners are: Amerada Hess Pipeline Corporation ("Amerada Hess"), ARCO Pipe Line Company ("ARCO"), Exxon Pipeline Company ("Exxon"), Mobil Alaska Pipeline Company ("Mobil"), Phillips Alaska Pipeline Corporation ("Phillips"), Sohio Alaska Pipe Line Company ("Sohio"), and Unocal Pipeline Company ("Union"). One of the original TAPS owners, BP Pipelines Inc. ("BP") was recently merged into Sohio, following the acquisition by The British Petroleum Company p.l.c. of Sohio's corporate parent.

² The relevant provisions of the Interstate Commerce Act (the "Act") and of the administrative regulations applicable to the

STATEMENT

TAPS is an 800-mile pipeline that transports crude oil from the Alaskan North Slope to the Port of Valdez on the Gulf of Alaska for transshipment by tanker to the lower 48 states. A unique set of circumstances, including the harsh climate, rugged terrain, the demands of environmental protection (including substantial above-ground construction), and the exigencies of the mid-1970s energy crisis, all contributed to the \$9 billion price tag of this unprecedented project. In 1977, when each of the TAPS owners filed its initial rate for transportation of crude oil through the pipeline, the Interstate Commerce Commission ("ICC"), which then had jurisdiction, ordered those rates suspended and instituted an investigation. The scope of the ensuing investigation into the TAPS rates ultimately conducted by the Federal Energy Regulatory Commission ("FERC" or "Commission") was on a scale similar to that of the construction project. The administrative proceedings alone spanned almost a full decade, producing tens of thousands of pages of testimony, and occupying the time of scores of lawyers, experts, judges, and other government officials.

After nine years of intensive administrative litigation, the parties with a direct economic interest in the proceeding entered into a settlement establishing a means of determining ceiling rates over the anticipated life of the pipeline. That settlement agreement has already reduced the initial rates that had precipitated the *TAPS* investigation by almost 50 percent. The FERC's review of the settlement itself resulted in more than a year of hearings, comments, evidentiary submissions and briefing, before the Commission approved the agreement as to all of the settling parties. The one non-consenting party, Arctic Slope Regional Corporation ("ASRC" or "Petitioner"), has neither shipped oil nor paid any TAPS rate up to the present time, but has based its participa-

Trans Alaska Pipeline System rate proceedings ("*TAPS*") are set forth at App., *infra*, at 3a-10a.

tion in the proceeding on its professed concern about future TAPS rates (*i.e.*, in the 1990s). The Commission, noting that its approval of the settlement as to the consenting parties had no precedential effect, expressly preserved the right of ASRC to initiate a challenge to any future TAPS rates, whether determined in accordance with the settlement or not. On that basis, the Commission terminated its investigation, and the court of appeals upheld the Commission's action as a sound exercise of administrative discretion.

1. *The TAPS Rate Case.*

The initial rates filed in May and June of 1977 by each of the TAPS owners—which ranged from \$6.04 to \$6.44 per barrel—were substantially higher than those prevailing today under the *TAPS* settlement. Although the TAPS owners contended that their initial rates were consistent with long-standing practice in the oil pipeline industry, the rates elicited protests from the Antitrust Division of the United States Department of Justice (“DOJ”), the State of Alaska (“State” or “Alaska”), the Bureau of Investigations and Enforcement of the ICC, and ASRC. These protestants sought to persuade the ICC to invoke its power under Section 15(7) of the Interstate Commerce Act: (1) to enter upon a hearing concerning the lawfulness of the initial TAPS rates; and (2) to suspend those rates for the maximum statutory period of seven months. *TAPS*, 355 I.C.C. 80 (1977). After hearing argument, the ICC, on its own initiative, suspended the initial TAPS rates on June 28, 1977 for the full seven month period, allowing the TAPS owners to file lower interim rates pending an investigation into the lawfulness of the rates contained in the suspended schedules. *Id.* at 81-82, 86.³

³ This Court upheld the ICC's order suspending the TAPS carriers' initial rates and setting interim rates in *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978).

Shortly after an ICC Administrative Law Judge ("Judge" or "ALJ") had bifurcated the *TAPS* investigation,⁴ the ICC's jurisdiction over oil pipeline rates was transferred to the FERC.⁵ On February 1, 1980, after several months of hearings, Judge Max L. Kane issued an Initial Decision in Phase I addressing a number of methodological issues and purporting to establish rates for the years 1978 and 1979, subject to such adjustments as might arise from Phase II. *TAPS*, 10 FERC (CCH) ¶ 63,026 (1980). Both the *TAPS* owners and the protestants filed extensive exceptions to the Initial Decision, but before the Commission could resolve these exceptions, the Phase I Decision was overtaken by other events. Specifically, the Commission initiated a rulemaking proceeding in another oil pipeline rate case, *Williams Pipe Line Company*, to devise a generic methodology for reviewing oil pipeline rates. After the exceptions to the Initial Decision in *TAPS* had been pending for more than two years, the Commission announced that a decision in *TAPS* would not be issued until it could reach a decision in *Williams*. *TAPS*, 20 FERC (CCH) ¶ 61,044 at 61,096 (1982).

On the strength of the *Williams* decision,⁶ which established a new generic approach to oil pipeline rate-making, the Commission remanded Phase I of *TAPS* to an ALJ to hold further hearings to determine whether its decision in *Williams* should affect its decision in *TAPS*. Again, however, events overtook the administrative process; before any such determination could be

⁴ Phase I of the *TAPS* proceeding was reserved for methodological ratemaking issues, while Phase II was devoted to cost of service issues such as the prudence of *TAPS* investment and expenses.

⁵ Department of Energy Organization Act, 42 U.S.C. §§ 7101 *et seq.*, and Executive Order No. 12009 (October 1, 1977).

⁶ See *Williams Pipe Line Co.*, Opinion No. 154, 21 FERC (CCH) ¶ 61,260 (Nov. 30, 1982), *rev'd sub nom. Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir.) ("*Farmers Union II*"), *cert. denied*, 469 U.S. 1034 (1984).

made, the court of appeals had overturned the innovative *Williams* decision (Opinion No. 154) in *Farmers Union II*, and the *TAPS* remand proceeding was suspended.⁷

Thus, by late fall of 1984, *TAPS* was nowhere near a final decision.

2. *The Background of the TAPS Settlement.*

Settlement discussions among the parties were prompted in no small part by their frustration over the obvious difficulty of resolving the myriad issues raised in this uniquely complex and seemingly interminable proceeding. The State, which was interested in securing just and reasonable rates for the life of the pipeline, realistically feared that the ongoing proceedings would permit only a decision as to the historic or "locked-in" rates being investigated, thus leaving future *TAPS* rates as a subject for future proceedings. At the same time, the carriers were faced with tremendous uncertainty as to future rates as well as potential refund obligations. These circumstances encouraged serious settlement discussions in which Alaska and ARCO took the lead. In November 1984, the State reached an agreement-in-principle with ARCO (subsequently joined by BP), which was to become the basis for settlement with the remaining *TAPS* carriers. By the middle of 1985, after securing only slight modifications in its terms, Exxon, Mobil, Phillips, and Union had joined the agreement.

In addition to establishing refunds for past periods—to be paid to the shippers who had utilized the pipeline and

⁷ In subsequent proceedings in *Williams*, see Opinion Nos. 154-B and 154-C, 31 FERC (CCH) ¶ 61,377, 33 FERC (CCH) ¶ 61,327 (1985), the Commission modified Opinion No. 154 to endorse a so-called Trended Original Cost model for setting just and reasonable oil pipeline rates, which differs markedly from the *TAPS* Initial Decision methodology. No hearings were held in *TAPS* to determine the applicability (if any) of the general rules established in Opinions Nos. 154-B and 154-C to the resolution of the issues in *TAPS*.

paid the challenged rates (a portion of these refunds inuring to the benefit of the State through its royalty and severance tax interest)—the *TAPS* settlement included a formula (the *TAPS Settlement Methodology* or “TSM”) for calculating the maximum rates the carriers could charge until the year 2011, the end of the pipeline’s estimated life. Over time, TSM is designed to achieve a sharply declining tariff profile through the use of accelerated depreciation, thus significantly reducing tariffs in future years when decisions regarding development of marginal petroleum reserves on Alaska’s North Slope are likely to be made.⁸ Under the settlement, the State agreed not to challenge *TAPS* rates so long as the carriers do not file rates which exceed the TSM ceiling. Furthermore, because the settlement agreement does not (and could not) impose any restrictions on the FERC’s rate authority, *TAPS* rates are subject to formal complaint by any non-signatories (such as ASRC), whether or not such rates satisfy the terms of the settlement agreement. Similarly, because TSM requires the carriers to file revised tariffs with the Commission each year, the carriers are subject to the possibility of suspension and investigation of each such annual filing, either in response to protest by non-signatories or on the Commission’s own motion.⁹

The Commission took the first step toward its ultimate approval of the agreement on October 23, 1985, when it

⁸ Since it has been in effect, TSM has already markedly reduced the pre-settlement *TAPS* rates from a weighted average of approximately \$6.00 per barrel to \$5.31 (immediately after adoption of the settlement) and, subsequently, to \$4.49 in 1986, \$3.91 in 1987 and \$3.14 in 1988.

⁹ To date, ASRC has not filed a formal complaint or a protest against the several rounds of *TAPS* rates which have been established pursuant to the settlement. Indeed, ASRC did not even attempt to intervene in a protest filed by the State on December 18, 1987, which alleged that the carriers had contravened TSM in certain respects. That protest was ultimately withdrawn on December 28, 1987, after the State and the carriers resolved their differences.

approved the *TAPS* settlement as “fair and reasonable and in the public interest” as among the State and the six settling carriers (all except Sohio and Amerada Hess).¹⁰ See *TAPS*, 33 FERC (CCH) ¶ 61,064 (1985) (“October 23 Order”) (Pet. App. at pp. 54a-64a). Recognizing the unique nature of the *TAPS* investigation, the Commission found that the “innovative methodology” fashioned by the settling parties would achieve their respective aims and result in a “rational and predictable tariff profile . . . [which would] encourage competitive exploration for Alaskan oil and enhance Alaska’s future oil-related revenues.”¹¹ While concluding that “the settling parties are entitled to the benefits of their bargain,” the Commission “acknowledge[d] the concerns of the nonsettling parties and . . . remand[ed] the proceedings with regard to them to the administrative law judges to allow the nonsettling parties a hearing only on those issues which apply to them.” *Id.* at 61,139-61,140.¹² On December 19, 1985, the Commission denied ASRC’s request for rehearing of this order. See *TAPS*, 33 FERC (CCH) ¶ 61,392 (December 19, 1985) (Pet. App. at pp. 50a-53a).

The second step toward approval of the ultimate *TAPS* settlement occurred on June 27, 1986, when the FERC approved as uncontested an amendment to the *TAPS* settlement by which Sohio and Amerada Hess joined the accord, and, at the same time, severed ASRC (the sole re-

¹⁰ The ALJs had certified the Six-Carrier Settlement Agreement to the Commission on August 9, 1985, 32 FERC (CCH) ¶ 63,058.

¹¹ The Commission also approved under 49 U.S.C. § 5(1) a separate agreement implementing a specific provision in the settlement agreement, which, under certain conditions, permitted the reallocation of certain costs and revenues among the carriers.

¹² On remand, ASRC introduced evidence relating primarily to the alleged impact that imposing the settlement on ASRC would have on its potential lease and royalty interests. Because none of the parties advocated imposing the settlement on ASRC, this evidence was admitted into the record without cross-examination or rebuttal.

maining non-consenting party) from the proceeding. *TAPS*, 35 FERC ¶ 61,425 (June 27, 1986) (Pet. App. at pp. 22a-44a).¹³ The Commission found that this "Two-Carrier Amendment" was "fair and reasonable and in the public interest" in accordance with FERC Rule 602(g), 18 C.F.R. § 385.602(g), governing approval of uncontested settlements. *Id.* at 61,977. In holding that severance of ASRC from the *TAPS* settlement rendered the agreement uncontested, the Commission reasoned that under its rules, "If a party's interests are not *immediately and irreparably affected* by approval of a settlement . . . , that party's opposition to a settlement does not create a genuine, material issue." *Id.* at 61,980-61,981 (emphasis in original) (citation omitted).

The Commission found that ASRC's interest in future *TAPS* rates was not "immediately and irreparably affected" for three reasons.¹⁴ First, because the settlement was not imposed on ASRC, it retained the right to challenge any future *TAPS* rates by filing a protest under Section 15(7) or a formal complaint under Section 13(1) of the Act. *Id.* at 61,980. Second, because the Commission did not determine TSM rates to be just and reasonable, its approval of the settlement could not be used as precedent in a future proceeding involving those rates. *Id.* Third, the Commission pledged to permit ASRC to use in such a future proceeding, any relevant evidence from the *TAPS* record, and agreed to make available the same ALJs who had presided in the earlier *TAPS* pro-

¹³ The Judges had certified the "Two-Carrier Amendment" to the Commission on April 23, 1986, noting that it was "identical in all material respects to the June 28, 1985 settlement proposal . . . approved by the Commission on October 23, 1985." 35 FERC (CCH) ¶ 63,027 at 65,075. They concluded, however, that "the Commission does not have the authority, under the facts of the remanded proceeding, to impose the settlement on the objecting parties." *Id.* at 65,076.

¹⁴ ASRC conceded before the FERC that it has no interest in refunds, because it has never shipped oil through *TAPS* or otherwise paid any tariff charges to the *TAPS* owners that could be refunded.

ceedings. *Id.* In terminating its investigation into the pre-settlement TAPS rates, the Commission rejected ASRC's contention that it was duty bound either by the Act or its own regulations to render a determination on the merits respecting TAPS rates or the settlement itself. *Id.*

3. *The Court of Appeals Decision.*

On October 27, 1987, the court of appeals denied ASRC's petitions for review, holding that the Commission's orders were within lawful bounds. 832 F.2d 158. Judge Kenneth Starr, writing for the unanimous panel, emphasized that ASRC's asserted interest in TAPS rates

"stems from its ongoing negotiation of exploration leases and the level of bonus and royalty payments it may achieve, sources of compensation that are *potentially* affected by transportation costs in bringing oil via TAPS to market. [ASRC] has never shipped any oil through the pipeline; indeed, all agree that [ASRC] has no realistic possibility of doing so until sometime in the 1990's."

Id. at 160 (emphasis added). With due regard for that asserted interest, the court rejected the "thrust" of ASRC's challenge—namely, that the Commission was "duty bound under the Interstate Commerce Act to see the 1977 rate proceeding to the terminus of determining whether the challenged rates were 'just and reasonable'" —holding that the Interstate Commerce Act confers broad discretion on the Commission to dispose of investigations initiated under Section 15(7) of the Act. *Id.* at 163-164. The court also emphasized the broad discretion conferred upon the Commission under its settlement rules, which permit it to "sever" contesting parties from settlements and approve such settlements as uncontested among the consenting parties. *Id.* Because the case involved a settlement, and in view of the protracted proceedings which would still be required to reach a final decision on the merits, the court turned aside ASRC's contention

that the progress made toward a final decision mandated a fully litigated outcome.

Although the court disputed the Commission's contention that ASRC was not aggrieved by the Commission's action and ruled that ASRC had standing to appeal the Commission's decisions, *id.* at 163-164, n.10, the court agreed that the Commission had adequately "safeguarded" ASRC's interest in TAPS rates. *Id.* at 167. Noting that ASRC was not a current ratepayer for transportation through TAPS, and that its right to challenge future TAPS rates was fully protected, the court concluded that the Commission had "serve[d] [ASRC's] interests by not forcing the settlement upon [ASRC] and by preserving possible future challenges for a riper moment." *Id.* That fact, coupled with the important public interest advantages of the settlement, persuaded the court that "the Commission acted within its lawful authority and sound discretion in closing a long and wearisome chapter in the saga of TAPS rate regulation." *Id.* at 168.

On January 15, 1988, the original panel of the court of appeals denied ASRC's petition for rehearing, and the court unanimously rejected ASRC's suggestion for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

The settlement Petitioner would have this Court disturb is the carefully-crafted product of years of arduous negotiation among the settling parties and additional years of detailed scrutiny by the FERC and the court of appeals. The public interest benefits achieved by this settlement are already a matter of public record. Namely, the most extensive oil pipeline rate case ever litigated has been ended with an agreement that resulted in the payment of refunds for the historic rates that precipitated the proceeding, and established a predictable methodology (TSM) for determining a *ceiling* on future TAPS rates. The Commission, the presiding ALJs, and the settling parties themselves concluded that TSM would

substantially enhance development of Alaskan North Slope oil reserves through a rapidly declining rate profile; in fact, TSM has ushered in an almost 50 percent rate reduction over the past three years. Because it is not bound by the settlement, Petitioner retains the right to seek even further rate reductions by initiating a new challenge against the prevailing rates, whether or not established pursuant to TSM.

Against the tide of unanimous assent by the two administrative law judges who presided over this litigation at the FERC; the five FERC commissioners who voted to approve the settlement; the three court of appeals judges who upheld the FERC's orders on the merits; and the ten other judges who voted unanimously to deny rehearing *en banc*, Petitioner raises two principal criticisms, neither of which withstands even passing scrutiny. First, Petitioner contends that the Interstate Commerce Act, the Commission's regulations, and due process all mandate a final litigated conclusion of the FERC's investigation in *TAPS*, notwithstanding that the settlement effectively superseded the initial rates upon which the investigation was founded and the record compiled. In making this argument, however, Petitioner relies on an inapplicable statutory provision; obscures the plain language of the Commission's settlement rules; and brushes to one side both the extensive opportunities it was given to express its position and the Commission's virtual invitation to ASRC to exhaust its administrative remedies by initiating a new proceeding against the prevailing *TAPS* rates. Moreover, in invoking the Court's *certiorari* jurisdiction, Petitioner has failed to demonstrate that this narrow and fact-bound issue warrants plenary review by the Court.

Second, Petitioner asserts, purely on semantic grounds, that the court of appeals improperly deviated from the rationale adopted by the Commission in approving the settlement. Here, Petitioner's argument seizes on a subtle disagreement involving subsidiary issues of standing,

while disregarding the substance of the court's clear endorsement of the FERC's efforts to safeguard Petitioner's asserted interests by preserving its right to seek further administrative redress. Petitioner's hypertech- nical and baseless ground for challenging the court of appeals' decision—which involves neither an unsettled issue of law nor a conflict in the lower courts—thus falls of its own weight.

I. PETITIONER HAS PRESENTED NO LEGAL ISSUE WARRANTING THIS COURT'S ATTENTION.

Petitioner has been utterly unable to establish that the decision below raises any significant legal issue or presents any substantive conflict with decisions of this Court or any court of appeals. Nor has Petitioner identified any cognizable interest to be advanced by this Court's review. Clearly, ASRC will suffer no irreparable injury, now or in the future if the decision below is sustained, since it retains all of the legal remedies it had before the settlement was approved. Simply stated, no valid ground exists in this case for invoking the certiorari jurisdiction of this Court.

A. The Commission's Action In Approving The TAPS Settlement And Terminating Its Investigation Did Not Violate The Interstate Commerce Act.

Petitioner's contention that the Interstate Commerce Act required the Commission to resolve its investigation in *TAPS* on the merits stems from a fundamental misconception of the nature of that proceeding and the governing statutory scheme. Petitioner does not, and could not, dispute that the Commission was authorized to terminate an investigation initiated under Section 15(7) of the Act, 49 U.S.C. § 15(7). Rather, Petitioner asserts erroneously that the Commission's investigation was initiated by a formal complaint under Section 13(1) of the Act, 49 U.S.C. § 13(1).

However, as the court of appeals recognized, the *TAPS* proceeding was *not* prompted by a formal complaint under

that section; rather, the Commission's investigation was initiated, *sua sponte*, following protests requesting that the Commission exercise its discretionary powers to suspend and investigate the initial rates proposed by the TAPS carriers under Sections 15(1) and 15(7) of the Act.¹⁵ Thus, in initiating its investigation, the ICC referred specifically and solely to "protests and petitions" asking it to "invoke [its] power under section 15(7) of the Interstate Commerce Act," 355 I.C.C. 80.¹⁶ Whatever ASRC may say now, it has never even attempted to invoke the Commission's authority under Section 13 by filing a formal complaint under that section.

Petitioner responds lamely that "because there is no requirement that the complainant or the Commission expressly cite Section 13 in order to invoke that provision, the court of appeals erred in relying on the absence of any such explicit reference in concluding that Section 13 was not involved in this case." Pet. at 23 (citations omitted). To the contrary, the procedural rule in effect when ASRC filed its protest in June of 1977, and expressly invoked by ASRC, specifically *forbade* the filing of formal complaints under Section 13 by a protestant petitioning the Commission to initiate a suspension and investigation proceeding under Section 15(7):

"Such protests will be considered as addressed to the discretion of the Commission and no protest shall include a prayer that it also be considered a formal complaint. Should a protestant desire to proceed

¹⁵ Just as Section 15(7) provides that the Commission may institute an investigation "upon complaint or upon its own initiative without complaint," Section 15(1) empowers the Commission to prescribe just and reasonable rates "after full hearing, upon a complaint made as provided in section 13 . . . or after full hearing . . . by the Commission on its own initiative. . . ." 49 U.S.C. § 15(1) (emphasis added).

¹⁶ See also *Trans Alaska Pipeline Rate Cases*, *supra*, 436 U.S. at 635 ("Acting pursuant to § 15(7) of the . . . Act, the [ICC] found that the *protests* lodged against the TAPS tariffs gave it [the ICC] 'reason to believe the proposed [initial] rates are not just and reasonable.'") (emphasis added).

further against a tariff or schedule which is not suspended, or which has been suspended and the suspension vacated, *a separate later formal complaint or petition should be filed.*"

49 C.F.R. § 1100.42(a) (1976) ("Rule 42") (emphasis added), *cited in Trans Alaska Pipeline Rate Cases, supra*, 436 U.S. at 635 n.5.¹⁷

Petitioner's alternative suggestion—that a protest "addressed to the Commission's discretion" under Section 15(7) must also be regarded as a formal complaint under Section 13—is equally absurd. This Court has made clear in the past that Sections 13 and 15 provide two entirely distinct remedies. Thus, in *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444 at 463 (1979) ("*Southern*"), the Court stated:

"It is . . . clear that [the § 13(1)] remedy is independent of § 15(8)(a) proceedings. First, the language of § 15(8)(a) suggests no linkage to § 13(1) Second, § 13(1) has been an independent and self-contained procedure since the Act was first passed in 1887. When § 15(8)(a) was added some 23 years later, there was no indication that it was intended as an *amendment* to § 13(1), rather than as a *limited pre-effective and Commission-initiated alternative to the posteffective and shipper-initiated procedures in § 13(1).*"¹⁸

(Former emphasis in original, latter emphasis added).

¹⁷ On its face, Rule 42 refutes ASRC's assertion that its protest constituted a formal complaint *as of the date it was filed*. ASRC cannot assert that any subsequent event transformed the TAPS investigation into a complaint proceeding under Section 13. After the TAPS proceeding was transferred to the FERC, no protestant ever invoked Section 13; the FERC simply resumed the Section 15 investigation where the ICC had left off.

¹⁸ Acceptance of Petitioner's assertion that a protest seeking suspension and investigation under Section 15(7) must also be regarded as a complaint under Section 13 would require this Court not only to repudiate the clear distinction between Section 13 and Section 15(7) which it has expressly recognized, but also to overturn a long line of cases upholding the Commission's discretion to

The court of appeals was thus clearly correct in acknowledging the Commission's broad discretion in conducting investigations initiated under Sections 15(7) and 15(1). The Commission's approval of the *TAPS* settlement without first determining that the rates established thereunder would be just and reasonable was tantamount to a decision not to investigate the underlying methodology of the settlement and the resultant rates. As this Court has held consistently, decisions of this nature are left exclusively to the Commission's discretion and may not be second-guessed by the courts. See *Southern, supra*, 442 U.S. at 452-454 (upholding ICC decision not to investigate the lawfulness of increased rates). Having approved the *TAPS* settlement without a decision on the merits, the Commission was under no compulsion to pursue its investigation into the no longer applicable "locked-in" *TAPS* rates.¹⁹ See *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 462 n.9, *reh'g denied*, 415 U.S. 952 (1974); accord

forbear from exercising its authority under Section 15(7). *E.g., Southern, supra*; *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289 (1975); *United States v. SCRAP*, 412 U.S. 669 (1973); and *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658 (1963). In each of these cases, the Commission's decision not to act came in response to protests under Section 15(7) that were procedurally identical to the protest filed by ASRC in *TAPS*.

¹⁹ Petitioner relies heavily on this Court's decision in *City of Chicago v. United States*, 396 U.S. 162 (1969), in asserting that the Commission was precluded from terminating its investigation without a decision on the merits. However, in *City of Chicago*, the ICC's decision terminating its investigation resulted in the immediate grant of the relief requested—i.e., the discontinuance of passenger service. Here, the initial rates that precipitated the *TAPS* investigation were superseded by the *TAPS* settlement. Therefore, the only question to be resolved following approval of the *TAPS* settlement would have been whether the refunds paid under the settlement correctly reflected just and reasonable rates for the historic period. However, ASRC admittedly has no interest in or right to refunds, and no parties affected by this aspect of the settlement contested the amount of refunds agreed upon.

New York Dock Railway v. United States, 696 F.2d 32 (2d Cir. 1982). Finally, the Commission was not required under Section 15(1) to prescribe just and reasonable rates to be observed in the 1990s, when ASRC's shipments of oil may or may not materialize. See *United States v. Louisiana*, 290 U.S. 70 (1933).²⁰

Nevertheless, Petitioner asserts that "[h]aving come this close to resolving the ratesetting methodology for the life of TAPS," the FERC was precluded from "concluding the proceeding without a decision." Pet. at 24 (citing *Minneapolis Gas Co. v. FPC*, 294 F.2d 212, 215 (D.C. Cir. 1961)). Petitioner's premise is without merit. As the court of appeals observed correctly, rather than being close to resolution, "the [TAPS] case was regrettably far from complete." 832 F.2d at 166.²¹ The factual record in the TAPS proceedings ends in 1982, and it is absurd to contend that the truncated record could be used to determine rates appropriate for the mid-1990s. Petitioner's further insistence that the 1980 Phase I Decision would, but for the settlement, constitute the appropriate basis for determining TAPS rates today (much less for the mid-1990s), is equally off the mark; that decision not only fails to reflect any resolution of the exceptions filed by all the parties (including ASRC),

²⁰ In practice, of course, a prescription of future rates does not establish permanent rates; such rates can be changed at any time if the Commission approves. Given the permissive nature of the authority conferred by Section 15(1) of the Act and the absence of any "meaningful standards" for exercising the Commission's authority, the court of appeals could not second-guess the Commission's decision not to prescribe future TAPS rates. *Heckler v. Chaney*, 470 U.S. 821, 832-833 (1985) (agency decisions not to enforce a statute are "presumptively unreviewable," and "the presumption [of unreviewability] may be rebutted [only] where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers").

²¹ Indeed, at the time the settlement was before them, one of the ALJs who presided over the proceeding predicted that a final determination regarding TAPS rates would require "at least 10 years" of further litigation. (FERC Tr. 59,602.)

but also was reached without benefit of the substantial body of evidence submitted in the Phase I remand proceedings in 1982. Furthermore, since that preliminary decision was rendered, the Commission, responding to the dictates of the court of appeals, has significantly altered its general approach to regulating oil pipeline rates, thus rendering the Initial Decision's methodology presumptively inapposite to any resolution of the TAPS proceeding.²²

B. The Commission Did Not Deprive ASRC Of Due Process In Approving The TAPS Settlement And Declining To Resolve ASRC's Objections On The Merits.

ASRC asserts that the Commission's handling of its investigation in *TAPS* violated the due process clause of the Fifth Amendment. However, a prerequisite for due process protection is some interest worthy of protection. Such protectable interests flow from "existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). "Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, at 481 (1972). In the present case, ASRC has failed to demonstrate either a genuine property interest or that the remedies that have been afforded it by the FERC fall short of constitutional requirements.

Petitioner's due process claim rests on nothing more than the untenable assumption that because its asserted interests were deemed by the court of appeals to support judicial standing, those interests must necessarily suffice as a property entitlement under the Fifth Amendment due process clause. However, as this Court has stated frequently, "a mere unilateral expectation or an

²² See Opinion Nos. 154-B and 154-C, *supra*, 31 FERC (CCH) ¶ 61,377, 33 FERC (CCH) ¶ 61,327 (1985).

abstract need is not a property interest entitled to protection." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *Roth, supra*, 408 U.S. at 577; *Perry v. Sindermann*, 408 U.S. 593, 603 (1972). Petitioner's alleged property interest in this case is extraordinarily speculative, rooted solely in ASRC's subjective expectation regarding the present value of its potential reserves and the possibility of such reserves successfully being developed.²³

Moreover, even if Petitioner could demonstrate a genuine property interest stemming from its possible petroleum reserves, the Interstate Commerce Act confers no entitlement to immediate relief from the future TAPS rates that allegedly would impair that interest.²⁴ This

²³ Notably, Petitioner has not yet extracted any oil from its lands, but has merely demonstrated varying degrees of likelihood that it *might* extract commercial quantities of petroleum in the mid-1990's. Nor has Petitioner established that any lease or royalty agreements into which it has actually entered have been affected by TAPS rates; it claims only that future TAPS rates may affect the returns it may receive under lease or royalty arrangements it may negotiate. Neither of these claimed interests possesses the level of certitude required to establish a genuine property interest.

²⁴ Petitioner has failed even to establish a direct link between TAPS rates and the results of its negotiations over lease and royalty agreements. As the court of appeals acknowledged, 832 F.2d at 160, ASRC's compensation under any impending lease and royalty agreements is only "*potentially* affected by transportation costs in bringing oil via TAPS to market." (Emphasis added).

The court noted that ASRC's petroleum prospects may hinge to a far greater degree upon world oil prices. *Id.* at 63 n.10. The tenuous nature of ASRC's exploratory prospects has been acknowledged by ASRC itself. In its comments on the Two-Carrier Amendment to the settlement agreement, ASRC asserted that its oil was considered "economically marginal" as of December 1985, and would be rendered unrecoverable by a tariff differential of less than \$1.00 per barrel (C.A. App. 1389). Since the time of these comments, world oil prices have declined—to ASRC's disadvantage—more than \$15.80 per barrel from approximately \$28.60 in December of 1985, to approximately \$12.80 as of July, 1988. *Platts Oilgram Price Report* (December 2, 1985 and July 11, 1988). During this same

Court has stated unequivocally that property entitlements are bestowed only by an express, unconditional statutory grant of such rights. See *Roth, supra*; *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). Where a statute confers discretion upon the administrator of a statute, and provides no clear guidelines governing the statute's enforcement, no genuine property right flows therefrom. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981). The statutory provisions applicable in the present case, Sections 15(7) and 15(1) of the Act, are completely discretionary and contain no guidelines to direct the Commission in its decisions to conduct investigations or prescribe just and reasonable rates for the future. See, e.g., *Southern, supra*, 442 U.S. 444. Particularly where, as here, Petitioner seeks relief from TSM rate ceilings in the 1990s that *may never be reached*,²⁵ its claimed entitlement for relief *today* is scarcely plausible.

In any case, the Commission clearly afforded ASRC all the process that was due under the circumstances. Although the required procedures may vary according to the interest at stake in a particular context, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319 (1976). In the present case, ASRC has been afforded every opportunity during the nine years of administrative proceedings before the FERC to state its position with respect to TAPS rates. Moreover, with respect to the settlement itself, ASRC was given repeated opportunities to demonstrate an impact from the

period, TAPS rates declined—to ASRC's ultimate advantage—by almost \$3.00, a decrease of almost 50%.

²⁵ As the Commission recognized in its June 27 Order, although the TAPS settlement provides that the State will not challenge rates at or below the TSM ceiling, it is not assured that rates will reach this maximum level in the 1990s, due to any number of economic uncertainties. 35 FERC (CCH) at 61,981.

settlement sufficient to justify rejection of the accord and require a Commission decision on the merits of TAPS rates. Indeed, the Commission went so far as to afford ASRC a proceeding of its own to demonstrate the need for immediate consideration of ASRC's complaints with regard to TAPS rates. By the time the FERC issued its June 27 Decision approving the settlement and terminating its investigation, the settlement itself had been the subject of more than a year of comments, evidence, hearings, briefs and procedural pleadings.

Even after the intensive proceedings devoted to the settlement, the Commission adequately "safeguarded" ASRC's potential interest "by not forcing the settlement upon [ASRC] and by preserving possible future challenges for a riper moment." 832 F.2d at 167. Thus, in its decision, the Commission repeatedly emphasized that "[w]e are not imposing the settlement on [ASRC] either directly or indirectly." 35 FERC (CCH) at 61,977. The Commission explained that, because ASRC was not bound by the settlement, it would be free to file a formal complaint against the settlement rates pursuant to Section 13(1) of the Act. *Id.* at 61,982. Further, because TSM requires that adjusted TAPS tariffs be filed every year, ASRC may file a protest under Section 15(7) at such times and request that the Commission suspend the filed rates and/or initiate an investigation. *Id.* at 61,983 n.17. The Commission declared, moreover, that all evidence introduced in the TAPS proceeding (as well as the same presiding ALJs) would be made available to ASRC in any subsequent proceeding.²⁶

²⁶ In a future proceeding under Section 15(7), the TAPS carriers would be required to demonstrate the reasonableness of TAPS rates, notwithstanding the FERC's approval of the settlement. As the Commission explained in its June 27 Decision, consistent with FERC rules, approval of the TAPS settlement has no precedential value with respect to future TAPS rates. TAPS, 35 FERC (CCH) at 61,981; *see also* 18 C.F.R. § 385.602(c)(1)(iv). The TAPS settlement agreement itself states that the parties do not intend that such approval will "have any precedential effect on tariff rate-

Petitioner can hardly contend that *only* the wholesale resurrection of the eleven-year-old TAPS investigation would accord it an "opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews, supra*. To the contrary, in circumstances virtually identical to those presented here, this Court has consistently recognized that further administrative remedies suffice to redress any claimed injury suffered as a result of agency action or inaction.²⁷ Thus, in *Southern, supra*, 442 U.S. at 454, the Court upheld the Commission's decision not to investigate increased freight rates on the ground that "any shipper may require the Commission to investigate the lawfulness of any rate at any time—and may secure judicial review of any decision not to do so—by filing a § 13(1) complaint."²⁸ See also *U.S. v. SCRAP, supra*, 412 U.S. at 692 n.16. ASRC's apparent unwillingness to avail itself of this remedy adds no weight to its desire to choose the docket in which to pursue its asserted interests. That unwillingness does not represent a legally cognizable interest, and appears to stem only from ASRC's desire—for whatever reason—to undo the settlement and reopen a myriad of issues regarding historic TAPS rates in which ASRC has no interest whatever.

making." Settlement Agreement, Introductory Statement at 2 (lodged as Supplemental Appendix).

²⁷ The notion that future administrative remedies suffice to accommodate injuries suffered in the course of an administrative proceeding has gained widespread acceptance among the courts in the specific area of rate regulation. See, e.g., *Cities of Carlisle and Neola, Iowa v. FERC*, 704 F.2d 1259, 1263 (D.C. Cir. 1983); *Aberdeen & Rockfish R.R. v. United States*, 664 F.2d 41, 42-43 (5th Cir. 1981).

²⁸ Indeed, given the existence of the settlement, ASRC has been given a premium in exercising its remedy; even after the Commission's approval of the settlement, ASRC remains free to litigate for even lower rates, without fear of the carriers winning the extra-contractual right to file tariffs in excess of the TSM ceilings.

C. The Commission's Approval Of The *TAPS* Settlement As To All Consenting Parties And The Termination Of The Proceeding Is Consistent With The FERC's Own Regulations As Well As Substantial Legal Precedent.

Petitioner challenges the court of appeals' holding that the Commission is vested with wide discretion under its settlement rules and, under the circumstances in this case, could properly approve the *TAPS* settlement, terminate its investigation and remit ASRC to its available remedies under the Act. Alleging, in essence, that the Commission's regulations do not mean what they say, Petitioner goes on to suggest that the court's holding is inconsistent with the rulings of this Court and other courts of appeals and has put the rules governing settlement into a state of confusion. However, the procedure contemplated by those rules—severing a party from a settlement, approving the settlement as uncontested, and preserving the severed party's right to seek further remedies in a separate proceeding—is, and has been, clear from the outset.²⁹ Moreover, that procedure comports with the same court's previous holding in *United Municipal Distributors Group v. FERC*, 732 F.2d 202

²⁹ Petitioner's contention that Rule 602(h) requires the Commission to resolve the merits of a contested settlement is significantly undercut by subpart (i) of Rule 602(h), which states only that "the Commission *may* decide the merits of the contested settlement issues" (emphasis added). Equally unsupported is Petitioner's conclusion that Rule 602(h)(ii)(B) provides nothing more than an alternative means for eliciting substantial evidence upon which to base approval of a contested settlement on the merits. That rule—which empowers the Commission to "[t]ake other action which the Commission determines to be appropriate"—confers far too much discretion to admit the restrictive gloss contrived by Petitioner. Moreover, Rule 602(h)(ii)(A), which permits the Commission to "establish procedures for the purpose of receiving additional evidence" upon which to approve a settlement on the merits, would, under Petitioner's interpretation, render alternative (B) wholly redundant. There is, after all, no other way to elicit evidence than by "receiving" it

(D.C. Cir. 1984), and in no way creates a conflict among the circuits or with any decision of this Court.³⁰

The rules of settlement in FERC proceedings are, and have been, abundantly clear. Indeed, the procedure employed by the FERC in approving the *TAPS* settlement—while assuring ASRC an opportunity to initiate a later challenge against the settlement rates—is precisely what the court of appeals approved in *United*, *supra*. There, the same court upheld a FERC decision that had severed a protestant from a proposed settlement and approved the settlement as uncontested, while affording the protestant (a current ratepayer) a further procedural remedy to challenge the rates it was being charged. Unlike the ratepayer in *United*, ASRC must save its “future challenge[] for a riper moment.” 832 F.2d at 167. However, unlike the situation in *United*, ASRC is *not* a current or past ratepayer, and thus the right to initiate a proceeding under Section 13 or Section 15 of the Act constitute its “legally prescribed remed[y].” *United supra*, 732 F.2d at 210, n.12; *see also Southern, supra*, 442 U.S. at 454; *U.S. v. SCRAP, supra*, 412 U.S. at 692 n.16.

Requiring the Commission to resolve all asserted grievances on the merits before approving a settlement would significantly erode the Commission’s settlement process as a means of securing fair and enduring solutions to complex regulatory litigation.³¹ As the court noted in

³⁰ Petitioner also contends that review is warranted because it involves administrative law principles enunciated by the United States Court of Appeals for the District of Columbia Circuit, a court asserted to be uniquely authoritative with respect to such principles. Aside from the impact that granting review on such grounds would have on this Court’s docket, Petitioner’s suggestion has been rejected by the D.C. Circuit itself (*Public Serv. Comm’n of N.Y. v. F.P.C.*, 472 F.2d 1270, 1271-73 (D.C. Cir. 1972)), and constitutes an inappropriate basis for granting certiorari.

³¹ Petitioner makes the specious claim that “increasing pressure” on courts and agencies to settle litigation provides a reason for this Court’s review. However, if anything in the law is well-settled,

Pennsylvania Gas & Water Co. v. FPC, 463 F.2d 1242, 1245 (D.C. Cir. 1972):

"If it were not within the power of the Commission to do so [terminate investigations on the basis of settlement], any customer of a natural gas company could tie up its supplier and the Commission for an indefinite period in the trial of a limitless variety of issues, where there is no genuine issue of material fact, despite the ease with which their inherent worth or worthlessness might otherwise be quickly determined."

See also *Northwest Pipeline Corp.*, 31 FERC (CCH) ¶ 61,263 at 61,516 (1985). Armed with veto power over settlements, participants in complex, multi-party regulatory litigation would be further emboldened to play "dog-in-the-manger" and frustrate the attempts of settling parties in hopes of extorting a better deal for itself, just as ASRC has attempted to do in *TAPS*.³²

Clearly, such a requirement cannot reasonably be inferred from the judicial decisions dealing with the treatment of settlements by the FERC. Petitioner refers, Pet. at 28-29, to a number of cases, including this Court's decision in *Mobil Oil Corp. v. FPC*, 417 U.S. 283 (1974), *aff'g Placid Oil Co. v. FPC*, 483 F.2d 880 (5th Cir.

it is that settlement of litigation, including regulatory cases, are favored by public policy. (See, e.g., *Williams v. First Nat'l Bank*, 216 U.S. 582 (1910); *Bergh v. Department of Transp.*, 794 F.2d 1575 (Fed. Cir.), *cert. denied*, 107 S.Ct. 437 (1986); *Continental Oil Co. v. FPC*, 373 F.2d 96 (10th Cir. 1967)).

³² Petitioner's assertion that it "would have joined the [*TAPS*] settlement in this case if certain modifications were made," Br. at 18, underscores this point. As a matter of fact, ASRC never volunteered to *join* the settlement. Rather, in its Comments filed in opposition to the Two-Carrier Amendment, ASRC offered to withdraw its opposition if the settlement were modified to conform more closely with ASRC's litigation position in the *TAPS* proceeding. (C.A. App. at 1422-1425.) In making that offer, however, ASRC made it abundantly clear that it in no way would be bound by the settlement, as modified, and would remain free to challenge *TAPS* rates filed pursuant to settlement, just as it is now. (*Id.*)

1973), which Petitioner asserts *requires* the Commission to address a disputed settlement on the merits. However, as the court of appeals concluded in *United, supra*, 732 F.2d at 209, "The *Mobil* Court's recognition that the Commission '*may*' approve a contested settlement on the merits by no stretch of the imagination translates into a requirement that the agency *must* do so." (Emphasis by court). The cases upon which Petitioner relies involve Commission approval of *contested* settlements, with the consequent imposition of the settlement terms on all of the parties to the proceeding. The fact that the Commission did not impose the *TAPS* settlement on ASRC rendered it a stranger to that settlement and enabled the Commission to approve the settlement as to the consenting parties as *uncontested*. Although the court of appeals noted in *Mobil* that "'even if there is a lack of unanimity, [a settlement] *may* be adopted as a resolution on the merits . . .'" 417 U.S. at 314 (original emphasis deleted), the court clearly did *not* suggest that the Commission was precluded from foregoing a decision on the merits, and approving a non-unanimous settlement as uncontested as to the consenting parties. None of the court of appeals' cases cited by ASRC suggests otherwise.

II. THE COURT OF APPEALS CORRECTLY UPHELD THE FERC'S DECISION ON THE SAME GROUNDS RELIED UPON BY THE COMMISSION.

In contending that the court of appeals violated this Court's injunction in *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947), against upholding agency decisions on grounds other than those advanced by the agency itself, Petitioner emphasizes the court's apparent disagreement with the FERC's finding that ASRC was not "aggrieved" by the Commission's approval of the settlement and the termination of its investigation in to *TAPS* rates. Petitioner also maintains that the Commission approved the settlement as *uncontested* under Rule 602(g) (by virtue of ASRC's lack of aggrievement), whereas the court upheld the FERC's action "as a proper exercise of administrative 'discretion'

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to take appropriate action to approve a *contested* settlement under Rule 602(h)." Pet. at 16 (citation omitted, emphasis added). Petitioner is wide of the mark for a number of reasons.

In the first place, a comparison of the court of appeals decision and the FERC's Orders fails to reflect the deviation identified by Petitioner; each opinion makes it clear that the procedure used by FERC in severing ASRC and approving the settlement as uncontested as to the settling parties depends upon *both* Rules 602(h) and 602(g).³³ Thus, in its October 23, December 19 and June 27 Orders, the FERC expressly relied on the court of appeals' previous decision in *United, supra*, 732 F.2d 202 (interpreting Rule 602(h)), in determining that ASRC's interest in opposing the settlement was not sufficient to block approval of the settlement as uncontested (under Rule 602(g)) with respect to the consenting parties. *TAPS*, 35 FERC (CCH) at 61,979-61,980.³⁴ The Court also relied upon its *United* decision in holding that Rule 602(h) of the FERC's settlement rules permitted the Commission to "sever a contesting party" to the settlement, "treat the matter as *uncontested*," and approve the settlement under the "fair and reasonable" standard (applicable to uncontested settlements) found in Rule 602(g). 832 F.2d at 164, 167 & nn.19, 21.

³³ Indeed, Petitioner's suggestion that the Commission did not invoke its discretion under Rule 602(h) in treating the settlement as uncontested is flatly inconsistent with the position taken by ASRC in its brief to the court of appeals, where it asserted that the Commission *erred in relying on that very rule*. According to ASRC, "FERC was forced to construe FERC Rule 602(h), dealing with *contested* offers of settlement (in approving the settlement as uncontested) . . . FERC relied on the second part of subsection (1) (of Rule 602(h)) to justify its actions." (ASRC C.A. Br. at 65 (emphasis in original)). Accordingly, Petitioner's *Chenery* argument is entitled to no credence.

³⁴ In its December 19 Order, the Commission expressly invoked Rule 602(h)(1)(iii) in support of its use of the severance procedure. 33 FERC (CCH) ¶ 61,392 n.4.

In the second place, ASRC's virtual exclusive reliance on the court's "disagreement" with the Commission on the issue of aggrievement is devoid of substance. In its June 23 Order, the Commission approved the Two-Carrier Amendment to the TAPS settlement on the basis of a previous holding in another proceeding that, "If a party's interests are not *immediately and irreparably affected* by approval of a settlement . . . that party's opposition to a settlement does not create a genuine, material issue.'" 35 FERC (CCH) at 61,980-61,981 (citation omitted) (emphasis by Commission). Based on the same standard, the Commission ruled that it was free to terminate its investigation into TAPS rates under Section 15(7) of the Act, since ASRC remained free to protect its interests by filing a protest against the TSM rates under Section 15(7) of the Act or a formal complaint under Section 13.

The court of appeals did not question the Commission's analysis in any meaningful way. It only questioned the Commission's subsidiary suggestion that ASRC was not aggrieved in the sense necessary to support judicial standing. 832 F.2d at 162-163 & n.10. The court agreed wholeheartedly with the Commission that ASRC's "less direct" interest was insufficient to preclude the action taken by the Commission in approving the settlement as to the consenting parties and terminating its investigation. *Id.* at 167, n.21. Indeed, the court stated explicitly that the Commission had adequately "serve[d] [ASRC's] interests by not forcing the settlement upon [ASRC] and by preserving possible future challenges for a ripper moment." *Id.* at 167. Because the court clearly agreed with the substance of the Commission's finding that ASRC's asserted interest had been properly accommodated, there is little to be gained by dissecting the court's commentary on the FERC's subsidiary findings as to standing.³⁵ "*Chenery* does not require that [the Court]

³⁵ Compare *Penn-Central Merger and Norfolk & Western Inclusion Cases*, 389 U.S. 486, 526-527 n.14 (1968) (Court refused to apply *Chenery* principle, where reviewing court had disputed "sub-

convert judicial review of agency action into a ping-pong game.” *NLRB v. Wyman-Gordon Co.*, 397 U.S. 759, 766-767 n.6 (1969).

Finally, the fact that the Commission had adequately protected ASRC’s interests in approving the settlement did not constitute the sole basis for the court’s decision to uphold the Commission. Indeed, the court expressly endorsed a number of other grounds advanced by the Commission in approving the settlement (all of which Petitioner fails to address), saying:

“Quite apart from bringing a merciful conclusion to the protracted litigation, the settlement’s salutary features include the fact that rates have come down substantially—and continue to do so—under the TSM; that the State of Alaska has received substantial refunds redounding to the benefit of its citizens; and that, in the Commission’s view, competition will be increased in the settlement’s wake. Finally, it is of no little moment that the entities charged with protecting the public interest, including the State of Alaska and the Department of Justice, have heartily approved of the settlement.”

832 F.2d at 167. The court also affirmed the Commission’s findings regarding the evidentiary obstacle to granting ASRC the relief it seeks—*i.e.*, a determination of just and reasonable rates for the 1990s and beyond. Like the Commission, the court believed that “[t]he reasonableness of rates to be charged into the 1990’s (and beyond) can hardly be evaluated exclusively on the basis of a factual record that draws to a close in 1982.” 832 F.2d at 166; *compare* 35 FERC (CCH) at 61,981. Under these circumstances, the court correctly found that the Commission’s decision not to undertake such an effort at this time was well-founded.

sidary” findings but agreed in substance with ICC decision); *see also Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974), *reh’g denied*, 420 U.S. 956 (1975).

III. THE DECISION BELOW SUBSTANTIALLY ADVANCES THE PUBLIC INTEREST WITHOUT DEPRIVING PETITIONER OF ANY LEGAL PROTECTION TO WHICH IT IS ENTITLED.

Petitioner does not, and cannot, challenge the manifest public benefits achieved under the *TAPS* settlement.- Both DOJ and the State, which litigated this matter for a decade as adversaries of the *TAPS* owners, have strongly endorsed this settlement for its public interest benefits. Specifically, the settlement has: (1) spelled the final chapter of what has now been more than eleven years of litigation; (2) resulted in payments of more than \$500 million in additional royalties and taxes to the State of Alaska and refunds to shippers unaffiliated with the *TAPS* owners; and (3) promoted the interest of the State and its citizenry by substantially reducing *TAPS* rates from an average of more than \$6.00 per barrel to an average of just over \$3.00 per barrel in less than three years, thus (in the Commission's view) "encourag[ing] competitive exploration for Alaskan oil and enhanc[ing] Alaska's future oil-related revenues." *TAPS*, 33 FERC (CCH) at 61,139. Finally, the settlement provides a measure of certainty for those who wish to develop the State's petroleum interests, by imposing a ceiling on future *TAPS* rates, and removing the questions involving the historic *TAPS* rates.

Further judicial review would serve only to cast doubt over the public benefits achieved by the settling parties by virtue of their bargain. Pending such review, the level of *TAPS* rates would again be subject to speculation, thereby impairing the State's ability to maximize the development of its petroleum resources. Such speculation could persist indefinitely, subject to resolution only retrospectively, after any particular rate became effective. The carriers would also be plagued by uncertainty concerning the extent of their refund obligations accrued

over eleven years of TAPS operations, as well as their rights with respect to future rates.

There is nothing to be gained, even by ASRC, from review of the court of appeals' decision. If this Court were to remand this proceeding to afford ASRC a further hearing with respect to the "rates in issue," that proceeding would be limited to the rates in effect prior to the implementation of the settlement agreement by the parties thereto—rates ASRC has never paid. The TSM rates filed in 1985, 1986, 1987, and 1988 have never been involved in the prior proceedings and thus would not be involved in any remand. Indeed, ASRC has never protested those rates, let alone filed a complaint directed to them, and no party with a direct interest in those rates has expressed any dissatisfaction with them. ASRC is fully protected by its right to file a complaint or protest against any future rates which impact its interests and those interests would not be advanced by reopening the TAPS proceedings which are the subject of its Petition.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD J. FLYNN, P.C.
EUGENE R. ELROD
KEVIN HAWLEY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
*Attorneys for the Owners
of the Trans Alaska
Pipeline System **

* All other counsel for respondent Owners of the Trans Alaska Pipeline System appear on the inside front cover.

APPENDIX

APPENDIX

APPENDIX

RULE 28.1 DISCLOSURE

Pursuant to Supreme Court Rule 28.1, respondents hereby submit the following list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each respondent.

Amerada Hess Pipeline Corporation

Amerada Hess Corporation
Alyeska Pipeline Service Company

ARCO Pipe Line Company

Atlantic Richfield Company
Alyeska Pipeline Service Company
ARCO Chemical Company
85819 Canada Ltd.

Exxon Pipeline Company

Exxon Corporation
Exxon Capital Holdings Corporation
Exxon Capital Corporation
Alyeska Pipeline Service Company

Mobil Alaska Pipeline Company

Mobil Corporation
Mobil Oil Corporation
Alyeska Pipeline Service Company

Phillips Alaska Pipeline Corporation

Phillips Petroleum Company
Phillips Investment Company
Alyeska Pipeline Service Company

Sohio Alaska Pipe Line Company

The British Petroleum Company p.l.c.
BP International Limited
BP America Inc.
The Standard Oil Company
Alyeska Pipeline Service Company
Sohio Pipe Line Company

Unocal Pipeline Company

Unocal Corporation
Union Oil Company of California
Alyeska Pipeline Service Company

STATUTORY AND REGULATORY
PROVISIONS INVOLVED

49 U.S.C. § 15(1)

§ 15 Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

- (1) Commission empowered to determine and prescribe rates, classifications, etc.

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so

prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed.

49 U.S.C. § 15(7)

- (7) Commission to determine lawfulness of new rates; suspension; refunds; nonapplicability to common carriers by railroads subject to chapter.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate

or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

18 C.F.R. § 385.602 (1987)

§ 385.602 Submission of settlement offers (Rule 602).

(a) *Applicability.* This section applies to written offers of settlement filed in any proceeding pending before the Commission or set for hearing under Subpart E. For purposes of this section, the term "offer of settlement" includes any written proposal to modify an offer of settlement.

(b) *Submission of Offer.* (1) Any participant in a proceeding may submit an offer of settlement at any time.

(2) An offer of settlement must be filed with the Secretary. The Secretary will transmit the offer to:

(i) The presiding officer, if the offer is filed after a hearing has been ordered under Subpart E of this part and before the presiding officer certifies the record to the Commission; or

(ii) The Commission.

(c) *Contents of offer.* (i) An offer of settlement must include:

(i) The settlement offer;

(ii) A separate explanatory statement;

(iii) Copies of, or references to, any document, testimony, or exhibit, including record citations if there is a record, and any other matters that the offerer considers relevant to the offer of settlement; and

(iv) A separate proposed Commission order approving the settlement, including the following statement: "The Commission's approval of this settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding."

(2) If an offer of settlement pertains to a tariff or rate filing, the offer must include any proposed change in a form suitable for inclusion in the filed rate schedules or tariffs, and a number of copies sufficient to satisfy the filing requirements applicable to tariff or rate filings of the type at issue in the proceeding.

(d) *Service.* (1) A participant offering settlement under this section must serve a copy of the offer of Settlement:

(i) On every participant in accordance with Rule 2010;

(ii) On any person required by the Commission's rules to be served with the pleading or tariff or rate schedule filing, with respect to which the proceeding was initiated.

(2) The participant serving the offer of settlement must notify any person or participant served under paragraph (d) (1) of this section of the date on which comments on the settlement are due under paragraph (f) of this section.

(e) *Use of non-approved offers of settlement as evidence.* (1) An offer of settlement that is not approved

by the Commission, and any comment on that offer, is not admissible in evidence against any participant who objects to its admission.

(2) Any discussion of the parties with respect to an offer of settlement that is not approved by the Commission is not subject to discovery or admissible in evidence.

(f) *Comments.* (1) A comment on an offer of settlement must be filed with the Secretary who will transmit the comment to the Commission, if the offer of settlement was transmitted to the Commission, or to the presiding officer in any other case.

(2) A comment on an offer of settlement may be filed not later than 20 days after the filing of the offer of settlement and reply comments may be filed not later than 30 days after the filing of the offer, unless otherwise provided by the Commission or the presiding officer.

(3) Any failure to file a comment constitutes a waiver of all objections to the offer of settlement.

(g) *Uncontested offers of settlement.* (1) If comments on an offer are transmitted to the presiding officer and the presiding officer finds that the offer is not contested by any participant, the presiding officer will certify to the Commission the offer of settlement, a statement that the offer of settlement is uncontested, and any hearing record or pleadings which relate to the offer of settlement.

(2) If comments on an offer of settlement are transmitted to the Commission, the Commission will determine whether the offer is uncontested.

(3) An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

(h) *Contested offers of settlement.* (1)(i) If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Com-

mission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.

(ii) If the Commission finds that the record lacks substantial evidence or that the contested issues can not be severed from the offer of settlement, the Commission will:

(A) Establish procedures for the purpose of receiving additional evidence before a presiding officer upon which a decision on the contested issues may reasonably be based; or

(B) Take other action which the Commission determines to be appropriate.

(iii) If contested issues are severable, the uncontested portions may be severed and decided in accordance with paragraph (g) of this section.

(2) (i) If any comment on an offer of settlement is transmitted to the presiding officer and the presiding officer determines that the offer is contested, whole or in part, by any participant, the presiding officer may certify all or part of the offer to the Commission. If any offer or part of an offer is contested by a party, the offer may be certified to the Commission only if paragraph (h) (2) (ii) or (iii) of this section applies.

(ii) Any offer of settlement or part of any offer may be certified to the Commission if the presiding officer determines that there is no genuine issue of material fact. Any certification by the presiding officer must contain the determination that there is no genuine issue of material fact and any hearing record or pleadings which relate to the offer or part of the offer being certified.

(iii) Any offer of settlement or part of any offer may be certified to the Commission, if:

(A) The parties concur on a motion for omission of the initial decision as provided in Rule 710;

(B) The presiding officer determines that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues; and

(C) The parties have an opportunity to avail themselves of their rights with respect to the presentation of evidence and cross-examination of opposing witnesses.

(iv) If any contested issues are severable, the uncontested portions of the settlement may be certified immediately by the presiding officer to the Commission for decision, as provided in paragraph (g) of this section.

(i) *Reservation of rights.* Any procedural right that a participant has in the absence of an offer of settlement is not affected by Commission disapproval, or approval subject to condition, of the uncontested portion of the offer of settlement.

49 C.F.R. § 1100.42 (1976)

§ 1100.42 Petitions for suspension of tariffs or schedules (Rule 42).

(a) *Content.* The protested tariff or schedule sought to be suspended should be identified by making reference to the name of the publishing carrier, freight forwarder, or agent, to the Interstate Commerce Commission number, and to the specific items or particular provisions protested. Reference should also be made to the tariff or schedule, and the specific provisions thereof, proposed to be superseded. The protest should state the grounds in support thereof, indicate in what respect the protested tariff or schedule is considered to be unlawful, and state what protestant offers by way of substitution. Such protests will be considered as addressed to the discretion of the Commission and no protest shall include a prayer that it also be considered a formal complaint. Should a

protestant desire to proceed further against a tariff or schedule which is not superseded, or which has been suspended and the suspension vacated, a separate later formal complaint or petition should be filed.

(b) *When filed.* Protests against, and requests for suspension of, tariffs or schedules filed under the act will not be considered unless made in writing and filed with the Commission at Washington, D.C. Such protests and requests for suspension shall reach the Commission at least 12 days (except as proved in paragraph (c) of this section) before the effective dates of the tariffs, schedules, or parts thereof to which they refer, unless the protested publications were filed on less than 30-days notice under the authority of this Commission, in which event the protests should be filed no less than 5 days before such effective dates. In an emergency, telegraphic protests will be acceptable if received within the time limits herein specified, provided they also fully comply with paragraph (a) of this section and copies thereof are immediately telegraphed by protestants to the respondent carriers or their publishing agents. Six copies of such telegrams should immediately be mailed by the protestants to the Commission at Washington.

* * * *

(d) *Copies; service.* Seven copies of each protest or reply filed under this section must be filed with the Commission and one copy of the protest simultaneously be served upon the publishing carrier, freight forwarder, or agent, and upon other persons known by protestant to be interested.

(e) *Reply to protest.* A reply to a protest filed under this section should be filed and served promptly.

* * * *



6
No. 87-1869

Supreme Court, U.S.

FILED

JUL 26 1988

JOSEPH C. SPANOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ARCTIC SLOPE REGIONAL CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

RESPONSE OF THE OWNERS OF THE
TRANS ALASKA PIPELINE SYSTEM
IN OPPOSITION TO MOTION FOR LEAVE
TO FILE BRIEF AS AMICUS CURIAE

RICHARD J. FLYNN, P.C.*
EUGENE R. ELROD
KEVIN HAWLEY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006

*Attorneys for the Owners of the
Trans Alaska Pipeline System*

* Counsel of Record

July 26, 1988

(Additional Attorneys Listed on Inside Cover)

DAVID T. ANDRIL
VINSON & ELKINS
1455 Pennsylvania Ave., N.W.
Suite 700
Washington, D.C. 20004

Of Counsel:

PAUL S. BILGORE
P.O. Box 22617
Long Beach, CA 90801-5619

Of Counsel:

THOMAS F. LEMONS, JR.
P.O. Box 2220
Houston, TX 77252-2180

Of Counsel:

JAMES R. KINZER
P.O. Box 900
Dallas, Texas 75221

Of Counsel:

GLENN E. DAVIS
1291 Adams Building
Bartlesville, OK 74004

ALBERT S. TABOR, JR.
JOHN E. KENNEDY
VINSON & ELKINS
First City Tower
Houston, TX 77002-6760
*Attorneys for Amerada Hess
Pipeline Corporation*

ROBERT E. JORDAN III
STEVEN H. BROSE
TIMOTHY M. WALSH
STEVEN REED
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
*Attorneys for ARCO Pipe
Line Company*

RICHARD J. FLYNN, P.C.
EUGENE R. ELROD
KEVIN HAWLEY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
*Attorneys for Exxon
Pipeline Company*

JOHN P. DEAN
DONOVAN LEISURE NEWTON
& IRVINE
1850 K Street, N.W.
Suite 1200
Washington, D.C. 20006
*Attorneys for Mobil Alaska
Pipeline Company*

RAYMOND N. SHIRLEY
BRIAN D. O'NEILL
LEBOEUF, LAMB, LEIBY &
MACRAE
Suite 1100
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
*Attorneys for Phillips Alaska
Pipeline Corporation*

Of Counsel:

ROBERT A. JOHNSON
FREDERICK G. WOHLSCHLAEGER
39-B-5300
200 Public Square
Cleveland, Ohio 44114-2375

Of Counsel:

ANTHONY G. MELAS
461 S. Boylston
Room 1133
Los Angeles, CA 90017

PHILIP R. EHRENKRANZ
KEITH R. MCCREA
PAUL F. FORSHAY
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004

*Attorneys for Sohio Alaska
Pipe Line Company*

PATRICK M. RAHER
HOGAN & HARTSON
555 13th Street, N.W.
Washington, D.C. 20004

*Attorneys for UNOCAL
Pipeline Company*

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1869

ARCTIC SLOPE REGIONAL CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

**RESPONSE OF THE OWNERS OF THE
TRANS ALASKA PIPELINE SYSTEM
IN OPPOSITION TO MOTION FOR LEAVE
TO FILE BRIEF AS AMICUS CURIAE**

Respondent owners of the Trans Alaska Pipeline System ("TAPS")¹ hereby submit their opposition to the

¹ The seven TAPS owners are: Amerada Hess Pipeline Corporation ("Amerada Hess"), ARCO Pipe Line Company ("ARCO"), Exxon Pipeline Company ("Exxon"), Mobil Alaska Pipeline Company ("Mobil"), Phillips Alaska Pipeline Corporation ("Phillips"), Sohio Alaska Pipe Line Company ("Sohio"), and Unocal Pipeline Company ("Union"). One of the original TAPS owners, BP Pipeline Inc. ("BP") was recently merged into Sohio, following the

motion of the Alaska Federation of Natives ("AFN") for leave to file a brief as *amicus curiae*. Accompanying AFN's motion is its brief in support of the petition for certiorari filed by Arctic Slope Regional Corporation ("ASRC"). The TAPS owners submit that AFN has shown no justification for appearing at such a late date in this protracted litigation and can make no positive contribution to the factual or legal issues at stake in this case.

In the first place, AFN has waited an inordinate amount of time before attempting to protect its asserted interest in TAPS rates. Administrative proceedings before the Interstate Commerce Commission ("ICC") and Federal Energy Regulatory Commission ("FERC" or "Commission") regarding TAPS rates were conducted continuously and publicly over a span of almost 10 years. At no time did AFN so much as enter an appearance in those proceedings, despite its own assertion that it has represented the interests of Alaska Natives for that entire period. AFN should not now be permitted to atone for its lack of diligence by claiming status before this Court as *amicus curiae*.

In the second place, AFN does not even purport to serve any interest not already fully represented before this Court. In its motion and brief, AFN claims that it represents "all Alaska Natives" (AFN Motion at 1), whose economic interests in Alaskan North Slope petroleum are assertedly affected by the court of appeals decision upholding the FERC's orders in *TAPS*. (AFN Br. at 1.) Specifically, AFN contends that the FERC's approval of the settlement in *TAPS* adversely affects the value of its interests in Alaska North Slope petroleum. However,

acquisition by The British Petroleum Company p.l.c. of Sohio's corporate parent. Respondent TAPS owners previously submitted a statement in accordance with Rule 28.1 in the appendix to their brief in opposition to certiorari, filed July 16, 1988.

this interest is indistinguishable from that already represented by ASRC in this proceeding. ASRC has continually asserted before the ICC, the FERC, the court of appeals and this Court that its economic interest in potential petroleum reserves on its land is adversely affected by TAPS rates and the settlement approved by the FERC. Thus, as ASRC stated in its brief to the court of appeals, "The interests of ASRC and all Alaska Natives have been intertwined with TAPS since the late 1960's when oil was discovered at Prudhoe Bay and plans were devised to transport it . . . to Valdez." (C.A. Br. at 5.)

Finally, granting AFN leave to file its brief in this matter would contribute little, if anything, to the resolution of the legal and factual issues in this case. Aside from duplicating in a summary fashion the arguments already made in ASRC's petition, AFN's brief contains certain factual misstatements and erroneous statements of law. For example, AFN suggests, contrary to fact, that the revenues received by Alaska Natives under 43 U.S.C. § 1606(i) will be reduced as a result of the FERC's approval of the settlement of the *TAPS* proceeding. (AFN Br. at 3.) However, by the time the *TAPS* settlement was announced in June of 1985, ASRC and all other regional corporations represented by AFN had been completely reimbursed through royalties collected on ANS crude petroleum. Similarly, AFN contends that "[its] share of revenue from [ASRC's] lands is diminished," as a result of the *TAPS* settlement. (*Id.*) AFN overlooks, however, that ASRC presently earns no petroleum-related revenue from its lands, since ASRC has not yet discovered oil that would be extractable in commercial quantities. AFN's "share" of such revenue would therefore be zero.

Like ASRC, AFN has misidentified the governing statute in this proceeding as Section 13(1) of the Interstate Commerce Act, 49 U.S.C. § 13(1). Because respondent

TAPS owners have adequately addressed that error in their brief in opposition to ASRC's petition for certiorari, (TAPS Owners' Br. at 12-17), those arguments need not be repeated here.

CONCLUSION

For the foregoing reasons, Respondent Owners Of The Trans Alaska Pipeline System request that the Motion For Leave To File Brief For The Alaska Federation Of Natives As Amicus Curiae In Support Of Petitioner be denied.

Respectfully submitted,

RICHARD J. FLYNN, P.C.
EUGENE R. ELROD
KEVIN HAWLEY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006

*Attorneys for the Owners of the
Trans Alaska Pipeline
System **

* All other counsel for respondent Owners of the Trans Alaska Pipeline System appear on the inside front cover.



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No. 87-1869

Supreme Court, U.S.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

ARCTIC SLOPE REGIONAL CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

PAUL M. BATOR

MARK I. LEVY *

*Mayer, Brown & Platt
190 South La Salle Street
Chicago, Illinois 60603
(312) 782-0600*

O. YALE LEWIS, JR.

RICHARD A. CURTIN

*Hendricks & Lewis
2675 First Interstate Center
Seattle, Washington 98104
(206) 624-1933*

WILLIAM W. BECKER

*Landfield, Becker & Green
1818 N Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 775-0300*

Counsel for Petitioner

* Counsel of Record

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REPLY BRIEF FOR THE PETITIONER

Our petition demonstrated that the decision of the court of appeals is both erroneous and important.¹ That decision, if allowed to stand, will adversely affect the development of Alaskan oil reserves and seriously and irreparably injure the vital economic interests of Alaskan Natives that were conferred by Congress in the Alaska Native Claims Settlement Act. The court below, although holding that petitioner suffered present injury, nonetheless upheld dismissal of petitioner's complaint after nearly a decade of administrative litigation, thereby allowing FERC to avoid a decision on the merits and treat as "uncontested" a settlement that petitioner hotly contested as producing excessive rates. All petitioner seeks is a reasoned decision by FERC, based on substantial evidence, as to the lawfulness of TAPS rates.

Respondents go to great lengths to obscure this fundamental issue. Their briefs contain a regrettably distorted and misleading presentation of the case. In fact, they have constantly shifted their grounds for resisting a decision on the merits, starting with the belated assertion that petitioner lacked standing after nine years of proceedings and continuing through their latest contention that this case is confined simply to the Commission's suspension authority. Nothing in respondents' arguments, however, blunts either the unconscionable unfairness or the serious legal errors that have occurred.²

¹ The court of appeals has already read its decision in this case to establish the wide "breadth of the Commission's discretion with respect to settlements." *Southern Union Gas Co. v. FERC*, 840 F.2d 964, 971 (D.C. Cir. 1988).

² FERC's brief in opposition is not filed on behalf of the United States, which is a statutory respondent in this case. See FERC Opp. 8-9 n.14. The United States also took no position in the court below on the validity of FERC's actions. See Position of the United States (D.C. Cir. filed July 14, 1987). Indeed, the United States explained that it had "supported the settlement offer on the condition that it be adopted as the 'complete and final resolution and

1. Respondents' contention that FERC had discretion to terminate the proceeding without deciding the merits of petitioner's challenges to the TAPS rates is based on the clearly incorrect assertion that the ICC "initiated the proceedings on its own motion under Section 15(7)" (FERC Opp. 14; see also Owners Opp. 13). The ICC's order plainly states that the Commission had "given careful consideration to the protests" filed by petitioner and other parties and, based on the protestants' submissions, had concluded "that a formal investigation concerning the lawfulness of the proposed rates should be instituted pursuant to sections 15(1) and 15(7) * * *." *Trans Alaska Pipeline System*, 355 I.C.C. 80, 80 (1977). See also *id.* at 81, 87.

Thus, it has been recognized from the very outset that the proceeding was being conducted pursuant to Section 15(1) as well as Section 15(7) to determine just and reasonable TAPS rates in response to the objections filed by petitioner and the other complaining parties.³ This Court too has understood the proceeding in this way. See *Trans Alaska Pipeline Rate Cases ("TAPS I")*, 436 U.S. 631, 636, 637 n.15 (1978) (the ICC "cited the protestants' arguments" and "instituted a formal adjudicatory investigation into the lawfulness of the suspended rates pursuant to 49 U.S.C. § 15(1)"). See also Pet. App. 12a.

This background is fatal to respondents' position. The ICC commenced the proceeding, upon consideration of the complainants' challenges, *under Section 15(1)*. In turn, Section 15(1) explicitly incorporates the provisions of

order of the Commission in the [TAPS] dockets as to all parties and all issues outstanding in these dockets," which condition would be fulfilled (in the absence of a decision on the merits) only if FERC was correct in its conclusion that petitioner did not "presently ha[ve] standing to contest the TAPS rates" (*id.* at 1)—a conclusion that the court of appeals expressly overturned.

³ See, e.g., ALJ's Report and Order on Pre-Hearing Conference (Aug. 17, 1977), at 1, 2 (C.A. Supp. App. 16, 17); ALJ's Initial Decision on Phase I Issues, *Trans Alaska Pipeline System*, 10 F.E.R.C. (CCH) ¶ 63,026 (1980), at 65,175, 65,221 (C.A. Supp. App. 34, 80).

Section 13 by referring to proceedings “upon a complaint made as provided in section 13 of this title.” 49 U.S.C. § 15(1). Accordingly, it is abundantly clear that the ICC initiated this proceeding based upon the complaints of petitioner and others, not *sua sponte*, and that in doing so it was subject to the duty under Section 13 to decide the merits of the case.

Contrary to its current position, FERC has previously recognized the applicability of Section 13 to this proceeding. This is most clearly seen in the Commission’s treatment of petitioner’s argument that it was entitled to a decision on the merits under *ICC v. Baird*, 194 U.S. 25 (1904)—one of the leading Section 13 decisions (see Pet. 21)—and Section 13(2), which provides that a complaint shall not be dismissed “because of the absence of direct damage to the complainant” (49 U.S.C. § 13(2)). FERC’s response to this argument was *not* that Section 13 authorities were irrelevant but rather that petitioner lacked standing because it was not injured:

[Section 13 as construed in *Baird*] merely recognizes the possibility of indirect damage. However, it in no way bars a dismissal where, as here, there is *no* immediate damage.

Pet. App. 40a n.51 (emphasis in original).⁴ Furthermore, the Commission conceded that petitioner would be “entitled” (*id.* at 27a (emphasis added)) to a decision on the merits as soon as it was aggrieved (*id.* at 27a, 41a, 43a).⁵ At no time prior to its brief in opposition has the Commission ever suggested that this proceeding is entirely a discretionary matter.

⁴ In light of Section 13(2), it was necessary for the Commission to find that there was *no* injury to petitioner and not simply (as the court of appeals subsequently concluded) that the injury was not sufficiently immediate and direct. See pages 9-10, *infra*.

⁵ Significantly, FERC’s conclusion was based on *United Municipal Distributors Group v. FERC*, 732 F.2d 202 (D.C. Cir. 1984), which was begun as a suspension proceeding (*id.* at 204).

Even if the ICC's order had not explicitly cited Section 15(1), it has long been the consistent practice that when the Commission orders a suspension and commences an investigation under Section 15(7), the parties are entitled to a determination of just and reasonable rates. As the ICC explained over a half-century ago:

*The proceeding is primarily into the lawfulness of what the carriers have proposed; suspension is an incident. * * ** We have held in such cases when brought upon complaint that looking to the substance, the complainant is entitled to a finding whether or not the expired rates were violative of the act. * * * [O]ur duty [is] to accept the issue tendered by the parties, and to determine it upon the record they have submitted.

Excursion Fares Between Chicago and Twin Cities, 178 I.C.C. 742, 743-744 (1931).

This administrative scheme is reflected in Rule 42 cited by the TAPS owners (Opp. 13-14). Because a Commission decision to suspend and investigate rates automatically triggers the procedure for an ultimate resolution on the merits, Rule 42 recognizes that it is unnecessary for a protesting party to file a formal complaint. However, if a tariff has not been suspended, the Rule provides that "a separate later formal complaint or petition should be filed" if "a protestant desire[s] to proceed further against [the rates]." 49 C.F.R. § 1100.42 (a) (1976). The regulatory framework thus recognizes that a proceeding on the merits is the same however it is begun and entitles a participating party to a decision on the lawfulness of the challenged rates.⁶

⁶ The TAPS owners repeatedly assert (Opp. 5, 11, 15 & n.19, 16, 21, 28, 29, 30) that the TSM rates have superseded the originally filed rates and therefore that the proceeding is not adequate to determine ongoing TAPS rates. If this assertion were correct, a carrier could always evade a ratemaking decision by unilaterally filing new tariffs that keep one step ahead of the administrative process. But in fact the owners' assertion is incorrect. First, in ordering this proceeding, the ICC specifically directed that "[i]n the

Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444 (1979), upon which respondents rely (FERC Opp. 15; Owners Opp. 14), simply held that the decision *not* to investigate a temporary suspension request under 49 U.S.C. § 15(8) (a) is unreviewable. Here, Section 15(1) was exactly intended to “augment[]” the remedies available in a Section 13 proceeding (*TAPS I*, 436 U.S. at 640) rather than to be an “independent” provision (*Southern Ry.*, 442 U.S. at 463), and the express language of Section 15(1) demonstrates the “linkage” between the sections that was absent in *Southern Ry.*

Respondents are equally incorrect in asserting that our position would require the Court to overrule its decisions that recognize the Commission’s discretion concerning the temporary suspension of rates under Section 15(7) (FERC Opp. 15; Owners Opp. 14-15 n.18). Most important, as explained in the petition (at 23 n.5), the language of Section 15(7) is permissive—the Commission “may * * * suspend” rates (49 U.S.C. § 15(7))—in contrast to the mandatory nature of Section 13 (as incorporated by reference in Section 15(1))—“it shall be the duty of the Commission to investigate” (49 U.S.C. § 13(1)). Nothing in our argument casts the slightest doubt on the Court’s decisions under the quite different provision in Section 15(7).

event the schedules here under investigation are changed, amended or reissued, * * * such changed, amended or reissued schedules will be included in this investigation” (355 I.C.C. at 87). See also *Excursion Fares*, quoted at page 4, *supra*. Moreover, at the heart of this proceeding is the establishment of a ratemaking *methodology*, not merely particular rates for individual years. Finally, this Court has held that the administrative process is not to be frustrated by the inherent lag in agency proceedings. See *Bowman Transp. v. Ark.-Best Freight System*, 419 U.S. 281, 294 (1974):

[While w]e appreciate the difficulties that arise when the lapse between hearing and ultimate decision is so long * * *, we have always been loath to require that factfinding begin anew merely because of delay in proceedings of such magnitude and complexity.

In the end, respondents' view of the statutory structure would drastically rewrite the Interstate Commerce Act. The danger in respondents' position is that it broadly extends FERC's previously cabined discretionary authority for the temporary suspension of rates under Section 15(7) and transforms it—retroactively, after nine years of adversarial proceedings—into an all-purpose discretion to avoid a decision on the merits. Section 15(7) is not an escape valve from the Commission's mandatory jurisdiction to determine just and reasonable rates. Respondents' efforts to re-label this proceeding at the eleventh hour should not be permitted to deprive petitioner as a proper complaining party of its rights under the Act.

2. FERC's own regulations require it to resolve objections on the merits before approving a contested settlement. See Pet. 24-28. Respondents counter (FERC Opp. 17-18; Owners Opp. 22 n.29) that FERC has no such obligation because under Rule 602(h)(1)(i) the Commission "may" decide the merits of contested settlements. That Rule, however, simply grants FERC the discretion to consider a contested settlement on the merits as an alternative to the litigated proceedings that would otherwise occur. See *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 312 (1974); 44 Fed. Reg. 34,936, 34,938 (1979) (contested settlements "may be considered and approved or disapproved if the record contains substantial evidence upon which to base a reasoned decision"). It in no way authorizes the Commission to approve a contested settlement except by adopting it as a decision on the merits.⁷

Perhaps even more telling than this faulty contention is the utter lack of any precedential support for respondents' position. *Respondents have failed to cite a single*

⁷ Our argument also does not render subsections A and B of Rule 602(h)(1)(ii) "wholly redundant" (Owners Opp. 22 n.29). Contrary to the owners' assertion, the Commission can obtain a record on which to base a "substantial evidence" decision through means other than an evidentiary hearing before an ALJ, e.g., by admissions, stipulations, or submission of an agreed record.

instance in which the Commission has sought to approve a contested settlement, or a court of appeals has upheld such an approval, that did not involve a decision on the merits. This unbroken practice is a powerful rebuttal to respondents' facile arguments.⁸

3. In answer to our due process argument (Pet. 17-20), respondents assert that no interest protected under the Due Process Clause is implicated here because the court below found that petitioner was only "potentially" affected (FERC Opp. 16; Owners Opp. 18 n.24). The court found no such thing; rather, it held that petitioner suffered "present injury" and "injury in fact" (Pet. App. 10a n.10), and that "the settlement currently affects Arctic's interests" and has an "assuredly real * * * impact * * * on Arctic" (*id.* at 17a, 18a n.20). Moreover, this adverse effect is immediate, substantial, and irreparable: excessive TAPS rates are *currently* depriving petitioner of many millions of dollars in revenues from its leases and deterring the development of its oil holdings, and these injuries *cannot be remedied* under the statutory provision for reparations to shippers.

Respondents are not helped by their allusion to the amorphous "balancing" of interests that the court below engaged in (FERC Opp. 17). "[A]s long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." *Goss v. Lopez*, 419 U.S. 565,

⁸ Despite respondents' blind insistence, *United* does not support a different conclusion. The nonconsenting party in *United* was given an immediate hearing at which its legal rights would be fully protected by a decision on the merits of its claims. That is precisely what petitioner has sought—and been denied—in the present case. See Pet. 26-27.

Likewise, *El Paso Natural Gas Co.*, 25 F.E.R.C. (CCH) ¶ 61,292 (1983), which FERC cites (Opp. 11 & n.16), is fully consistent with our position. In that case, the nonconsenting parties' only objection was resolved in their favor (*id.* at 61,673). Moreover, the settlement at issue related solely to other parties in a consolidated proceeding (*ibid.*).

576 (1975). Respondents cite no decision holding that the procedural rights of a litigant can be overridden—and present, substantial, and irreparable injury thereby imposed—on the asserted policy ground that other parties have a more direct interest that is entitled to greater weight.

Respondents' extended discussion of the proceedings that FERC conducted (Owners Opp. 19-20) is similarly beside the point. Petitioner's opportunity to be heard was reduced to naught when the Commission refused to consider the lawfulness of TAPS rates. A party's due process right to "a hearing on the merits of his cause" (*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982)) is meaningless if it does not include the right to a decision.⁹

⁹ The TAPS owners also make a number of assertions that have no bearing on the issues presented in the petition. For example, they suggest (Opp. 2) that the \$9 billion cost of pipeline construction was prudent and justified by special circumstances (even though those circumstances were known at the time of the initial cost estimate of \$1 billion). Likewise, the owners state (*id.* at 6, 10, 19 & n.25) that the TSM rates are only a ceiling and that actual rates will be lower (even though petitioner's expert evidence shows that the settlement contains features that will drive the actual charges up to the level of the ceilings). These contentions go to the merits, however, which are not now at issue. Indeed, it is precisely FERC's refusal to decide the merits that is the gravamen of our petition. Suffice it to say that petitioner disagrees with, and has adduced record evidence to controvert, the owners' claims on the merits.

FERC (Opp. 5, 11) and the TAPS owners (Opp. 2, 6 & n.8, 10-11, 29) also proudly proclaim that the settlement provides for declining rates over time. What they fail to mention, however, is that both the ratemaking methodology adopted by the ALJ's initial decision on Phase I, and the methodology proposed by petitioner, have declining rate profiles as well and in fact produce rates that are consistently below those set by the settlement methodology. See C.A. App. 1387. While the TAPS owners note (Opp. 5 n.7, 17) that the initial decision does not conform to ratemaking standards subsequently adopted by the Commission, that development largely involves a mathematical conversion and does not alter the comparison between initial decision rates and TSM rates.

4. In a blizzard of misleading quotations and administrative citations, respondents stubbornly insist (FERC Opp. 11-13; Owners Opp. 25-28) that the “balancing” approach of the court of appeals rests on the same rationale that FERC had adopted. Nothing could be further from the truth.

It is crystal clear that FERC, in dismissing petitioner and approving the settlement as uncontested, based its decision solely on the ground that as a matter of law petitioner was not aggrieved. The Commission itself expressly explained its decision in exactly those terms (Pet. App. 24a (emphasis added)) :

As discussed below, the Commission finds that since it is not imposing the settlement on Arctic, *Arctic's interests are not affected by it. Accordingly, its opposition to the settlement is moot. Since the result of the settlement does not present any current, genuine, material issues, we may dispose of the matter before us by treating the Amended Settlement Agreement as an uncontested settlement.*

This reasoning is repeated time and time again in the Commission's order.¹⁰ Thus, the Commission “conclude[d] that Arctic has not shown any present or immediate harm or demonstrated any ‘immediate prospect of future in-

¹⁰ See, e.g., Pet. App. 26a n.17 (“[a]pproval of the settlement does not in any way affect Arctic's rights”); 34a (“Arctic is not at the present time aggrieved by the settlement”); 36a (emphasis omitted) (“Arctic is [n]ot [a]ggrieved by the [s]ettlement”); *ibid.* (“Arctic must be particularly ‘aggrieved’ by the settlement in order to legitimately challenge the settlement on the merits”); 38a (“the settlement will not cause any real harm to Arctic[.]”); 39a n.47 (“we have concluded that the TAPS settlement tariffs do not affect [Arctic]”); 41a n.54 (“the absence of Arctic's aggrievement”). In fact, it was on the theory that petitioner was not aggrieved that the Commission sought to distinguish this Court's decisions in *Baird* (see Pet. App. 40a n.51) and *City of Chicago v. United States*, 396 U.S. 162 (1969) (see Pet. App. 34a & nn.33, 34), as well as the *United* decision (see Pet. App. 27a) “in *United* * * * the objecting parties were entitled to an immediate hearing on the merits * * * because [they] had immediate interests”).

jury' to its interests. * * * Consequently, we approve the settlement, and terminate the proceeding without prejudice" (*id.* at 38a, 40a). This understanding of FERC's decision is confirmed by the Commission's explicit recognition that "[i]f, and when Arctic is actually aggrieved, it may contest TAPS' rates" (*id.* at 41a).

There is not a shred of support for respondents' assertion that FERC engaged in the sort of balancing of interests and exercise of discretion on which the court below rested its decision. Rather, as the court observed, FERC's rationale was that it "discerned no present aggrievement on Arctic's part by virtue of the settlement" (Pet. App. 8a). FERC's statement that a contesting "'party's interests [must be] *immediately and irreparably affected*'" (*id.* at 36a (emphasis in original)), which respondents stress (FERC Opp. 12; Owners Opp. 27), simply recites the standing test it was applying and does not represent a discretionary weighing of interests.

Indeed, that statement is immediately followed by a crucial passage that makes the Commission's rationale indisputable (Pet. App. 36a (first emphasis added)):

Arctic must be particularly "aggrieved" by the settlement in order to legitimately challenge the settlement on the merits. *The courts have fashioned a test to determine judicial standing which we think is appropriate in this context as well.* The test is whether a party "has sustained an injury *in fact* to an interest arguably within the zone of interests protected or regulated by the [Interstate Commerce Act]."

It is therefore patently not the case that FERC "analogized" its standard to that of judicial standing (FERC Opp. 12) or that the issue of petitioner's aggrievement was "subsidiary" (Owners Opp. 27). FERC's conclusion that petitioner was not aggrieved and therefore failed to meet the test for judicial standing was the sole and determinative basis for its decision—a basis that the court of appeals squarely reversed. See Pet. 9-10, 16.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the judgment of the court of appeals with respect to Question 2 presented in the petition.

Respectfully submitted.

PAUL M. BATOR

MARK I. LEVY *

Mayer, Brown & Platt

190 South La Salle Street

Chicago, Illinois 60603

(312) 782-0600

O. YALE LEWIS, JR.

RICHARD A. CURTIN

Hendricks & Lewis

2675 First Interstate Center

Seattle, Washington 98104

(206) 624-1933

WILLIAM W. BECKER

Landfield, Becker & Green

1818 N Street, N.W.

Suite 300

Washington, D.C. 20036

(202) 775-0300

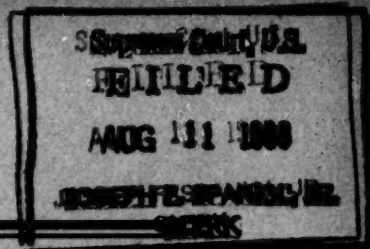
Counsel for Petitioner

AUGUST 1988

* Counsel of Record

(8)

No. 87-1869



In the Supreme Court of the United States

OCTOBER TERM, 1988

ARCTIC SLOPE REGIONAL CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY OF ALASKA FEDERATION OF NATIVES
TO THE RESPONSE OF THE OWNERS OF
THE TRANS ALASKA PIPELINE SYSTEM
IN OPPOSITION TO AFN'S MOTION
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

DONALD CRAIG MITCHELL
1552 Orca Street
Anchorage, Alaska 99501
(907) 276-1681
Counsel for Amicus Curiae

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1. The Alaska Federation of Natives ("AFN") seeks leave to file a brief as *amicus curiae* to inform the Court of the broad impact of the decision below. Apparently, the TAPS owners confuse the function of an *amicus* brief with the criterion for intervention as a party. Response 2-3. Contrary to their assertions, it is entirely appropriate at the certiorari stage of the case for the AFN to advise the Court that persons other than Arctic will be injured by the ruling below.

2. The TAPS owners' accusation that the AFN's *amicus* brief contains "factual misstatements and erroneous statements of law" (Response 3) is baseless. Their statement that Arctic "presently earns no petroleum re-

lated revenue . . . since [Arctic] has not yet discovered oil" (*ibid.*) is flatly incorrect: As of June 30, 1987, Arctic had distributed some thirty-one million dollars from oil land lease bonus and rental payments to the other Regional Corporations pursuant to section 1606(i) of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1606(i).¹ But for excessive TAPS tariffs, these payments would have been higher, and the adverse effect of the court of appeals' decision on Arctic's leasing program will reduce future payments.

3. The TAPS owners are similarly incorrect in their averment that the TAPS settlement will not affect § 1606(i) payments "because [Arctic] and all other regional corporations represented by AFN had been completely reimbursed through royalties collected on ANS crude petroleum." *Ibid.* The owners confuse payments due under § 1606(i) with payments due to the Alaska Native Fund, *see* 43 U.S.C. § 1605, pursuant to 43 U.S.C. § 1608. Section 1608 provided for payments of \$500 million into the fund from royalties from oil development *on government lands*. This provision has nothing to do with the obligation pursuant to § 1606(i) for Regional Corporations to share current revenues.

Accordingly, the Alaska Federation of Natives respectfully requests that the Court grant its motion for leave to file a brief as *amicus curiae*.

Respectfully submitted,

DONALD CRAIG MITCHELL
1552 Orca Street
Anchorage, Alaska 99501
(907) 276-1681

Counsel for Amicus Curiae

August, 1988

¹ Section 1606(i) provides that "[s]eventy per centum of all revenues received by each Regional Corporation from . . . subsurface estate patented to it . . . shall be divided annually . . . among all twelve Regional Corporations." 43 U.S.C. § 1606(i).

